Petition

81-366

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No.

IN THE

Supreme Court of the United States

October Term, 1981

SUN SHIP, INC.

Petitioner

v.

ROBERT N. MURPHY

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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ROBERT N. MURPHY

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Respondents

QUESTION PRESENTED FOR REVIEW

1. Whether a claimant has suffered a permanent partial disability compensable under the Longshoremen's and Harbor Workers' Compensation Act when his actual post-injury earnings exceed his average weekly wage prior to the injury and those actual post-injury earnings fairly and adequately represent his post-injury wage-earning capacity.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Justices of the Supreme Court of the United States:

The petitioner, Sun Ship, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this proceeding on May 28, 1981.

OPINIONS BELOW

1. The Judgment Order of the United States Court of Appeals for the Third Circuit is unreported and appears at page A1 of the Appendix to this Petition.

2. The opinion of the Benefits Review Board of the United States Department of Labor of July 29, 1980 affirming the Administrative Law Judge's Decision and Order on Remand is reported at 12 B. R. B. S. 539 (B. R. B. 1980) and appears at page A55 of the Appendix to this Petition.

3. The opinion of the Benefits Review Board of the United States Department of Labor of April 28, 1978 remanding the Administrative Law Judge's Decision on Remand is reported at 8 B. R. B. S. 212 (B. R. B. 1978) and appears at page A44 of the Appendix to this Petition.

4. The opinion of the Benefits Review Board of the United States Department of Labor of March 21, 1977 remanding the Administrative Law Judge's Decision and Order is reported at 5 B. R. B. S. 609 (B. R. B. 1977) and appears at page A23 of the Appendix to this Petition.

5. The Second Decision and Order on Remand of the Administrative Law Judge of December 19, 1978 is unre-

ported and appears at page A50 of the Appendix to this Petition.

6. The Decision Upon Remand of the Administrative Law Judge of July 13, 1977 is unreported and appears at page A34 of the Appendix to this Petition.

7. The Supplemental Decision and Order of the Administrative Law Judge of March 19, 1976 is unreported and appears at page A20 of the Appendix to this Petition.

8. The Decision and Order of the Administrative Law Judge of February 19, 1976 is unreported and appears at page A3 of the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 28, 1981. This petition for writ of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

STATUTES INVOLVED

33 U. S. C. § 908(c)(21) provides in pertinent part:

> Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages . . . and shall be paid to the employee, as follows:
>
> • • •
>
> (21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same

employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

33 U. S. C. § 908(h) provides in pertinent part:

The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section . . . shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, that if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U. S. C. § 910 provides in pertinent part:

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation.

STATEMENT OF THE CASE

This is an action on a workmen's compensation claim filed in March 1974, by Robert N. Murphy ("Murphy") against Sun Ship, Inc. ("Sun Ship") for compensation for alleged permanent partial disability pursuant to the Longshoremen's and Harbor Workers' Compensation Act ("the Act"), 33 U. S. C. § 901 *et seq.* The claim was originally heard by Administrative Law Judge David W. Pelkey on September 17, 1975, and the evidence adduced at that hearing and a subsequent hearing on remand shows the following facts.[1]

In October 1972, claimant Murphy, age 58, was employed in Sun Ship's shipyard in Chester, Pennsylvania as a "cleaner" or laborer in its Cleaning Department. In 1972, the base wage rate for cleaners, exclusive of all premiums paid for special duties, was $3.325 per hour. (68a; 121a; 326.)[2] As an employee of the Cleaning Department, Murphy had the additional opportunity to operate grit-blasting equipment for which a premium rate of $4.19 per hour was paid. (121a; 326a.) Murphy's average weekly wage in 1972 was $158.79 per week.[3]

1. In all of the proceedings below, except during the initial administrative hearing on his claim before ALJ Pelkey, Murphy's claim was consolidated with those of two other claimants, Leroy Brooks and James L. Bennett. In this petition, Sun Ship seeks a writ of certiorari to review only the judgment of the court of appeals in Murphy's case and does not seek review of that judgment insofar as it affects Messrs. Bennett and Brooks.

2. Record references are to the pages of the Appendix in the court of appeals.

3. This average weekly wage was stipulated to by Murphy and Sun Ship. Although the date of Murphy's injury was not expressly determined below, the parties' stipulation reflects their view that the date of injury for purposes of determining Murphy's average weekly wage was in October 1972.

On October 9, 1972, a routine X-ray in Sun Ship's dispensary revealed changes in Murphy's lungs which made advisable his permanent removal from blasting duties. Murphy lost no actual work time as a result of the discovery and did not seek any medical treatment until January 1974 when the changes were diagnosed as pneumoconiosis. (68a; 334a-335a; 352a.) In March 1975, Murphy was transferred from the Cleaning Department to the boiler shop at Sun Ship and promoted to third-class mechanic. In that position he immediately earned $4.92 per hour as base pay, forty-one cents per hour more than the base cleaning rate in 1975 of $4.505 per hour. (68a; 121a; 122a; 346a.) Furthermore, this new position afforded a much greater opportunity for advancement, promotion and further training than had the former position as a cleaner, and Murphy was eligible for overtime work at either time-and-a-half or double-time rates. (68a-69a; 342a-344a; 347a-348a.) Murphy performed well in the new position and was promoted to second class mechanic, earning $6.07 per hour, by June 1977. (381a.) Murphy's income as reflected by his tax records increased steadily in the post-injury period from $8,257.20 in 1972 to $11,825.08 in 1976.[4] In addition, Murphy's wage-earning capacity in his medically disabled condition in the open market in 1975 was $185.00 per week, which exceeded his average weekly wage at the time of his injury. (397a.)

On February 19, 1976, Judge Pelkey issued his initial Decision and Order awarding Murphy compensation from October 9, 1972 for a twenty per cent permanent partial disability. The administrative law judge derived this figure through comparison of what he described as

4. As reflected by Murphy's tax records for 1972 through 1974, submitted as exhibits for claimant, and additional evidence, his gross earnings were as follows: 1972: $8,257.20; 1973: $8,303.18; 1974; $9,432.05; and 1976: $11,825.08. (362a-364a; 381a.)

Murphy's pre-injury earning capacity, or the ability to earn $4.19 per hour as a "sandblaster," and the hourly wage which he could earn immediately after the injury in 1972 as a cleaner, $3.325. Judge Pelkey further approved this figure as supportable by reference to Murphy's "age, education, and work history," and alluded to Murphy's permanent reassignment to the higher paying mechanic's position only in passing with the comment that Murphy had not "undergone formal vocational retraining experiences." (76a.)

On review, the Benefits Review Board reversed the decision, stressing that the Act called for a comparison of the claimant's average weekly wage at the time of the injury, rather than a hypothetical wage he might have earned had he blasted full-time, and post-injury wage-earning capacity. (22a-23a.) The Board did not find erroneous the administrative law judge's disregard of Murphy's higher wage in his new job assignment. Instead, the Board's opinion merely re-stated the *proviso* to Section 8(h), apparently assuming that Murphy's post-injury wages were somehow "unfair" or "unreasonable," and approved the administrative law judge's purported consideration of "various factors" in fixing a wage-earning capacity.

In his Decision on Remand dated July 13, 1977, Judge Pelkey adopted his previous finding of a twenty per cent permanent total disability, believing that his initial decision had met the Board's requirements and that there was no need to modify his determination as to the extent of Murphy's disability. The Board again disagreed with Judge Pelkey's application of the statutory provisions and remanded the case again. The Board continued to emphasize the importance of adhering to the statutory scheme and directed the administrative law judge to derive

a dollar figure representing Murphy's wage-earning capacity at the time of the initial hearing in 1975. (11a-13a.) Judge Capps, the Administrative Law Judge who succeeded Judge Pelkey on the case, interpreted this directive as permitting her to subtract twenty per cent (*i.e.* Judge Pelkey's finding as to disability) of Murphy's pre-injury average weekly wage from that pre-injury wage figure and declare the result to be his earning capacity subsequent to the injury. The Board "*per curiam*" affirmed the resulting figure on July 29, 1980 as "supported by substantial evidence."

Sun Ship appealed the Board's order to the United States Court of Appeals for the Third Circuit pursuant to 33 U. S. C. § 921(c). On appeal, Sun Ship argued, *inter alia*, that the extent of disability had been improperly calculated, because the Board had not followed the statutory mandate to use post-injury wages unless those wages were found to be "unfair" or "unreasonable," which they had not been. Had the statutory scheme been followed, Sun Ship argued that the necessary conclusion would have been that Murphy's earning capacity suffered no impairment and that any finding that actual post-injury earnings were "unfair" or "unreasonable" was not supported by substantial evidence. These arguments were premised on the undisputed facts of record that Murphy's post-injury actual wages and wage-earning capacity in the open market exceeded his average weekly wage at the time of injury.

The instant petition for a writ of certiorari follows a Judgment Order entered by the court of appeals on March 28, 1981, affirming the Board's Decision and Order.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Judgment Affirming an Award of Benefits to Murphy Is Irreconcilable With the Application of the Statutory Standard of Compensability in Cases of Permanent Partial Disability by Its Own and Other Circuits and by the Benefits Review Board.

In affirming without opinion the decision of the Benefits Review Board to award Murphy compensation, the court of appeals necessarily interpreted Sections 8(c)(21) and 8(h) of the Act in a manner contrary to the plain meaning of those sections and inconsistent with both an analogous decision in its own Circuit and similar decisions in other Circuits and in the Benefits Review Board.

Compensation for permanent partial disability under the Longshoremen's Act is payable, except for a scheduled loss, only where there has been a loss of wage-earning capacity by reason of the injury. *Welch v. Leavey*, 397 F. 2d 189, 191 (5th Cir. 1968), *cert. denied*, 393 U. S. 1049 (1969).[5] Such loss is to be measured by a comparison of the employee's average weekly wage prior to the injury and his "wage-earning capacity thereafter in the same employment or otherwise." 33 U. S. C. § 8(c)(21). Section 8(h) of the Act directs that the post-injury wage-earning capacity *shall* be determined by the employee's *actual* earnings if such earnings fairly and reasonably represent his wage-earning capacity. 33 U. S. C. § 908(h).

In this case, the administrative law judge, in a finding affirmed by the Board, failed to consider whether Murphy's higher earnings and improved prospects as a third and subsequently a second class mechanic were a "fair and

5. Section 2(10) of the Act defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U. S. C. § 902(10).

reasonable" indicator of his ability to obtain and maintain employment in the future. Instead, the ALJ concentrated at first on Murphy's potential loss of income as a full-time blaster, a comparison rejected even by the Board. On the first remand the administrative law judge merely adopted the percentage derived from that first erroneous comparison, purporting to have derived it from consideration of Murphy's capacity to work as a general laborer in the ship construction industry, his age, education, work history, and "lack of formal vocational retraining experience." Judge Pelkey, in other words, ignored Murphy's higher post-injury wages and proceeded directly to the *proviso* of Section 8(h) of the Act without making any determination that Murphy's actual wages did not fairly and adequately represent his wage-earning capacity. On the second remand, Judge Capps merely accepted this approach without analysis in calculating a dollar figure for Murphy's wage-earning capacity. This result, which was affirmed by the Board and ultimately by the court of appeals Judgment Order, fails to adhere to the Congressional scheme for determining the compensability of work-related injuries.

The court of appeals decision is also at odds with the reasoning of the United States Court of Appeals for the Fifth Circuit in *Welch v. Leavey*, 397 F. 2d 189 (5th Cir. 1968), *cert. denied*, 393 U. S. 1049 (1969) and the United States Court of Appeals for the Fourth Circuit in *Owens v. Traynor*, 396 F. 2d 783 (4th Cir.), *cert. denied*, 393 U. S. 962 (1968), *aff'g* 274 F. Supp. 770 (D. Md. 1966). In *Welch v. Leavey*, the court of appeals, on facts wholly apposite to the case at bar, affirmed a denial of compensation benefits under the Act. The court interpreted the statutory scheme as mandating use of actual wages as the base for determination of wage-earning capacity unless the factfinder determines that such wages are unrepre-

sentative. While adjustments to the actual wage may be appropriate after such a finding, the Fifth Circuit found that actual wages were "clearly the most concrete data in the compensation analysis," providing "strong practical reasons" for serving as the basis of any calculation of the extent of disability. 397 F. 2d at 192.[6]

In *Owens v. Traynor*, in a Memorandum opinion, the court of appeals upheld the district court's affirmance of an administrative decision to deny benefits to a claimant who had suffered a back injury but whose post-injury earnings substantially exceeded prior earnings. 396 F. 2d at 785. The district court's opinion makes clear that it is the claimant's burden to demonstrate that his current wages do not accurately reflect his wage-earning capacity, and that the claimant in that case had failed to convince the court that he had not been "earning" the higher wage after the injury. 274 F. Supp. at 774.

In both *Welch v. Leavey* and *Owens v. Traynor*, the actual post-injury wages of the claimant were considered to be the norm in determinations of lost wage-earning capacity, and in the latter case the claimant bore the burden of demonstrating that resort to the *proviso* for consideration of additional factors was necessary in the interests of justice. In sharp contrast, the court of appeals in this case summarily affirmed an administrative determination that neither used actual wages nor found that such wages were unfair or unreasonable representations of claimant's wage-earning capacity.

The Judgment Order of the court of appeals in this case is also inconsistent with a recent decision by another panel of that court in *McCabe v. Sun Shipbuilding & Dry*

6. There is no evidence in this case and no suggestion has ever been made that Sun Ship is "carrying" Murphy or that he is not "earning" his higher wages, initially as a third, and now as a second class mechanic. *Cf. Bath Iron Works Corp. v. White*, 584 F. 2d 569 (1st Cir. 1978).

Dock Co., 602 F. 2d 59 (3d Cir. 1979). In *McCabe*, the administrative law judge had determined the extent of disability by comparing the claimant's 1974 pre-injury wages as a chipper and caulker with the wages of a parking lot attendant at the time of the hearing in 1976. The attendant position had been offered to the claimant following his injury. Holding this comparison to be error, the *McCabe* panel stated that "[t]he appropriate comparison should have been between the wages the claimant would have been earning had he *remained* as a chipper [in 1976] and the wages he could have earned in another position." *Id.* at 63 (emphasis added). The court thus compared two post-injury wages, neither of which was the claimant's actual wages and neither of which represented his average weekly wage at the time of the injury. This view apparently reflected the *McCabe* panel's desire to compensate the claimant for intervening wage inflation, since it noted that "there was a strong likelihood that the 1976 wages of a chipper were higher than 1974 wages." *Id.*

Bennett and *McCabe* are irreconcilable, although *McCabe* reflects its own deviation from the statutory formula. The statute expressly directs comparison with the claimant's average weekly wage, a figure derived in accordance with Section 10 of the Act, 33 U. S. C. § 910, as the claimant's wage *at the time of the injury*. Because Congress clearly provided for the effects of inflation, as in the automatic annual adjustment of payments for permanent *total* disability or death pursuant to Section 10(f) of the Act, 33 U. S. C. § 910(f), when it considered such allowances to be in the national interest, *McCabe* takes an unwarranted liberty with the statutory framework, by introducing an inflationary factor in cases of permanent *partial* disability.

The separate unauthorized departure from the Act represented by the *McCabe* decision is not an isolated instance. The Benefits Review Board, the national tribunal charged with primary responsibility for uniform administration of the Act, has established still another rule. In *Moore v. J.F. Shea Construction Co.*, 13 B. R. B. S. 370 (B. R. B. 1981), the Board, while condemning the *McCabe* formula as "contrary to the statute," endorsed a comparison between the average weekly wage at the time of the injury and the average weekly wage in a claimant's post-injury position also *at the time of the injury*. 13 B. R. B. S. at 374. Thus, rather than a comparison of wage rates at the time of the hearing, the Board's new formula simply presents the reverse, in which both figures refer back to the pre-injury period. While the Board correctly recognizes that *McCabe* was erroneously decided, its own formula is no more faithful to the statute. Although the Board is not a court of appeals, it plays an important role in directing and supervising the adjudicative process under the Act and has adopted a rule in direct conflict with *McCabe* and different from the approach taken by the courts of appeals in *Welch v. Leavey* and *Owens v. Traynor* and in this case.

II. Whether Compensation May Be Payable for Permanent Partial Disability Under the Longshoremen's Act in Cases Where Post-Injury Earnings Actually Increase Presents an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

As reflected by the preceding discussion, the decision contained in the Judgment Order of the Third Circuit in this case is simply the latest in a series of cases substituting varying and inconsistent rationales for the calculation of

lost wage-earning capacity mandated by the Act. The importance of the issue of determining the compensability of an injury and the necessity of calculating lost wage-earning capacity in every case in which permanent partial disability is alleged further underscore the need for a uniform standard as directed by this Court.

As this Court recognized in *Del Vecchio v. Bowers*, 296 U. S. 280, 285 (1935), the Longshoremen's Act is legislation of national application whose administration and enforcement make peculiarly important the need for precedents which can be uniformly and generally applied. The importance of correctly estimating the extent of a claimant's disability, particularly when the result may be to deny benefits altogether, is readily apparent. Moreover, the issue necessarily arises in numerous cases each year in which permanent partial disability is alleged.

This Court has never interpreted the statutory requirements for calculating the lost wage-earning capacity of those claiming benefits under the Act for permanent partial disability. The uncertainty as to statutory obligations resulting from this silence and the proliferation of litigation engendered by conflicting applications of the legislative standard can only be resolved by a definitive pronouncement by this Court. For this reason, to permit uniform administration of the Act where the claimant's actual post-injury wages substantially exceed those of the pre-injury period, the petitioner respectfully requests the grant of certiorari to review the judgment below.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,

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Appendix.

UNITED STATES OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2351

SUN SHIP, INC., Employer
Petitioner

v.

JAMES L. BENNETT, ROBERT N. MURPHY,
and LEROY BROOKS, Claimants,
Respondents

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Respondent

Petition for Review of an Order of
The Benefits Review Board
BRB Nos. 79-139, 79-172 & 79-173

Argued May 21, 1981

Before: ADAMS, ROSENN and HIGGINBOTHAM,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by Petitioner, it is

ADJUSTED AND ORDERED that the decision and order of the Benefits Review Board affirming the decision and order of the Administrative Law Judge be and is hereby affirmed.

Costs taxed against Petitioner.

BY THE COURT,

/s/ ARLIN M. ADAMS
Circuit Judge

ATTEST:

/s/ SALLY MRVOS
Sally Mrvos, Clerk

DATED: May 28, 1981

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D. C. 20036

CASE No. 76-LHCA-29
OWCP No. 3-6412

In the Matter of
ROBERT N. MURPHY,
Claimant

v.

SUN SHIPBUILDING AND DRY DOCK COMPANY,
Employer

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For the Employer

Before: DAVID W. PELKEY
Administrative Law Judge

DECISION AND ORDER

Claimant seeks compensation for permanent 25% partial disability from October 9, 1972, under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. 901 *et seq.* (the Act). This Decision and Order follows a September 17, 1975, hearing that was conducted in accordance with 5 U. S. C. 554. At the hearing, the parties represented that they had reached agreements as to the issues to be adjudicated and as to a fact to be taken as admitted. Those agreements, framed as stipulations, follow:

Stipulation of Issues to be Adjudicated

Whether Claimant incurred an occupational disease (injury) that arose naturally out of his employment.

Whether, if Claimant incurred such an injury, he suffered a permanent 25% loss of capacity to earn the wages he was receiving at the time of the injury in the same or any other employment.

Whether Claimant gave Employer timely notice of the alleged injury.

Whether Claimant's claim was filed in a timely manner.

Stipulation of Fact to be taken as Admitted

On October 9, 1972, Claimant's average weekly wages totalled $158.79.

Statement of the Case

For Claimant, a vocational rehabilitation specialist/manpower consultant/psychologist testified as to his September 5, 1975, interview with Claimant. On the basis thereof, he noted that, after having worked as a general cleaner, a sandblaster and again a general cleaner, Claimant was then working as a grinding machine operator. As

such an operator, he earned more than a general cleaner but less than a sandblaster ($4.94 vs. $5.31).

The witness was aware that Employer had disqualified Claimant for sandblasting work, because of a lung condition, in October 1972. He submitted that Claimant had an hourly earning capacity of $3.50-$4.50 prior to that time. He proposed that, absent the lung condition, Claimant would have had an hourly earning capacity of $5.00. In his opinion, Claimant's age (57 years), the progressive nature of the lung condition, limited education, and other physical problems (hypertension and arthritis), combined to produce a 33%-35% vocational disability. He attributed a 28%-30% vocational disability to Claimant's age and lung condition.

In connection with such testimony and by reference to the record in the claim of *James Bennett,* 76-LHCA27, Employer incorporated information depicting the regular hourly wages of cleaners and the premium pay received by sandblasters, as follows:

Year	*Regular Pay*	*Premium Pay*
1972	$3.325	$.865
1973	3.75	.71
1974	4.22	.74
1975	4.505	.805

Claimant testified that he has worked for Employer as a cleaner and sandblaster since 1952 but that he has performed no sandblasting duties since October 1972. Prior to that month, he sandblasted at least three days a week and received premium pay therefor.

The witness said that his foreman sent him to Employer's dispensary on October 9, 1972. There, the dispensary director told Claimant that he had dust "or something" in his lungs and that the condition resulted from

sandblasting. Thereafter, he was not allowed to sandblast. Approximately six months later and because he was not feeling well, he visited a doctor who told him to "lay off" smoking but who did not mention sandblasting.

Between October 9, 1972, and the "first of 1975," Claimant performed only general cleaning duties. At the latter time, he was transferred to the Boiler Department, where he now works as a third class mechanic and earns $4.92 an hour.

In January 1974, Claimant saw the doctor whose medical reports are in this record. That doctor, who he has seen once since the initial visit, told him that his lung condition is attributable to sandblasting. The witness reported at the hearing that he feels good some days and that he does not feel good on other days.

For Employer, Claimant's supervisor testified that Claimant's boilermaker assignment affords him better financial and career opportunities than he was afforded when he worked in the Cleaning Department. He noted that, as a first class mechanic, Claimant was then earning $.41 more per hour than he had earned as a general cleaner. Too, he noted that Claimant had worked overtime on 12 week-ends since March 1975.

The witness evaluated Claimant as a good, an above-average, worker who had presented no employment problems and who had always accomplished assigned tasks.

By reference to *Leroy Brooks,* 76-LHCA-28, Employer incorporated herein testimony of the assistant foreman in the Cleaning Department, as follows: The foreman stated that there was no sandblaster job classification in the Department; that all employees therein were classified as cleaners. The witness said that work in the Department involved climbing, crawling, and lifting items weighing up to 50 pounds. Functions included janitor work, lumber sorting, gas-freeing of fuel oil tanks, and grit-blasting.

Because the last two functions were very dirty and difficult, premium wages were paid therefor. He said that blasting generally was done by employees with longest seniority and that it occupied approximately 30% of their time. Relative to overtime work, he submitted that blasters performed no more thereof than did other cleaners in the Department.

Employer also incorporated herein, by reference to the *Brooks* record, two exhibits that had been accepted therein. The first exhibit was a laboratory test report on samples of "Black Beauty" and "Poly-Grit", two sandblasting grits. Neither sample reflected the presence of free silica. Both samples reflected composition, primarily, of ferric oxide, silicon dioxide and aluminum oxide. (Employer incorporated into this record a September 17, 1975, report in which a doctor stated that his examination of the test report revealed that each sample was incapable of producing silicosis when inhaled, and that neither sample contained a fibrogenic substance capable of producing disabling pneumoconiosis).

The second exhibit pertained to 13 employees who were "grit-blasters" in 1973 and 1974. Figures therein showed that a blaster averaged 397 hours sandblasting at "straight" time in 1973; 41 hours sandblasting at "bonus" time in 1973; 337 hours sandblasting at "straight" time in 1974; and 26 hours sandblasting at "bonus" time in 1974. The figures also showed that a blaster's premium pay was 4.1% of his gross pay in 1973 and 3.15% of such pay in 1974. In rebuttal, and again by incorporation from the *Brooks* record, Claimant presented the testimony of one of Claimant's co-workers who variously testified that: A) in 1972, he sandblasted eight hours a day on three or four days a week; B) in 1973, he did more work for premium pay than he had in 1972, earning $10,998.25; and C) in 1974, he "worked about seven days a week", he blasted approximately 771 hours and he earned $11,599.26.

Claimant submitted a physician's reports dated February 18 and December 2, 1974, and August 25, 1975. The February 18 report reflected Claimant's complaint of shortness of breath, at times. X-ray at the time of the January 28 examination revealed diffuse nodulation (with nodules of 1-2 mm. in diameter) throughout all zones of the lungs. Clinically, there was a moderate advanced, or Stage 2, pneumoconiosis, possibly silicosis, or a reaction to "black beauty". A slight degree of ventilatory impairment was attributed to the pneumoconiosis.

The December 2 report contained the conclusions that Claimant's employment was a proximate, contributing and precipitating cause of the pulmonary condition, and that the lung condition prevents work as a sandblaster.

The August 25 report, based on an August 22, 1975, examination, reflected continued presence of the nodules. Although the x-ray still produced evidence of pneumoconiosis related to previous exposure to silica and "black beauty", there was no clinical suggestion of deterioration in Claimant's general condition. The report concluded that Claimant's employment was a proximate, contributing and precipitating cause of the lung condition.

Further, Claimant submitted documentation reflecting gross income, as follows:

1970 — $6530.53
1971 — 7622.45
1972 — 8257.20
1973 — 8303.18
1974 — 9432.05

Too, he submitted a copy of the claim for compensation that was filed on March 8, 1974.

Subsequent to the hearing, Employer submitted a summary represented to reflect the overtime hours worked

by Claimant from 1970 through 1975. The summary indicated that Claimant worked overtime totalling 660.50 hours from 1970 through 1972 and 617.25 hours from 1973 through 1975. Percentagewise, the summary indicated that, during the latter period, Claimant's overtime work was reduced by approximately 7% from the amount worked in the earlier period.

Discussion

On brief, Employer noted that, under Section 12 of the Act, a claim is barred unless an employee gives an employer written notice of an injury within 30 days after the date of the injury. Employer represented that the notice requirement is jurisdictional, that Claimant did not comply with the requirement, and that failure of compliance results in the claim being barred by operation of law. On brief, Claimant submitted that timely notice was given. The record does not support the submission; it is rejected.

At the hearing, neither party presented testimony involving a date on which Section 12 notice was given. At and subsequent to the hearing, neither party submitted documentation relating thereto. The administrative law judge recognizes and appreciates the Employer's burden in an attempt to prove, persuasively, that Claimant neither gave the required notice nor took reasonable measures to effect the same. However, Employer tendered no evidence to show that it did not receive Section 12 notice. The lack of tender of such proof becomes pertinent when considered with Claimant's suggestion on brief, unaccompanied by argument, that a presumption of notice should prevail.

Section 20 of the Act provides that, in the absence of substantial evidence that sufficient notice of a claim has not been given, there shall be the presumption that

sufficient notice of such claim has been given. No "substantial evidence to the contrary" appears of record. Accordingly, the presumption of proper notice under Section 12 is found to prevail. However, record evidence indicates the claim should not be barred, absent operation of the presumption.

Claimant's uncompromised testimony establishes the fact that on October 9, 1972, he had knowledge indicating that his lung condition was related to his sandblasting activities. That he had an obligation to give the Section 12 notice within 30 days thereof is deemed to be established. Likewise, it is deemed to be established that he did not give such notice.

Section 12 provides that a failure to give the required notice will not bar a claim if: A) an employer had knowledge of the injury and B) a deputy commissioner determines that the employer has not been prejudiced by the failure to give notice. The record is found to contain evidence sufficient to support the conclusion that, although the required notice was not given, the claim herein is not barred for that reason.

On brief, Employer acknowledged that, on and after October 9, 1972, it had knowledge of Claimant's lung condition. However, for purposes of Section 12 and Section 30 (to be discussed hereafter), Employer argued lack of knowledge that the condition was the result of working conditions for which it was responsible, lack of knowledge for which it was to be chargeable under the Act. In support thereof, Employer quoted from so much of the opinion in *Sun Shipbuilding and Dry Dock Co. v. Bowman,* CA5, 507 F. 2d 146 (1975), as indicated that the court did not attribute to Congress an intention that the knowledge requirement be fulfilled in a situation "when the employer has no reason to know whether it is the party responsible for the injury or ailment of a particular em-

ployee." *Sun* is distinguished from the instant situation in that there was evidence that the hearing loss condition, to which knowledge was referenced in *Sun*, existed before the employee began working for the firm. In the instant matter, there is no evidence that Claimant's lung condition pre-dated commencement of employment by Employer.

Further, Employer's submission that, reasonably, it did not relate Claimant's lung condition to working conditions for which Employer was responsible is unpersuasive. It ignores the uncontradicted attribution by the dispensary director, on October 9, 1972, reported by Claimant. Too, the record supports an ineluctable conclusion that Employer, only, was responsible for working conditions that constituted the environment in which Claimant worked. Employer is charged with knowledge within the meaning of the Act.

Relative to prejudice, Employer submitted that the lack of prompt notice denied it the opportunity to investigate the claim "at a time sufficiently close to the date of injury to allow the gathering of evidence necessary to defeat false claims". In view of record evidence that, on October 9, 1972, Employer's dispensary director attributed Claimant's condition to sandblasting activities, it is concluded that Employer was, that date, put on notice of need to take reasonable steps to protect itself against a claim by Claimant. The record indicates that some such steps were taken.

The statute references a determination on prejudice by a deputy commissioner. Due process and proper administrative policy and procedure are considered to dictate the need for a hearing prior to such a determination. Section 919(d) of the Act requires that hearings thereunder be held in accordance with 5 U. S. C. 554 by a hearing examiner (now administrative law judge) quali-

fied under 5 U. S. C. 3105. Too, all powers, duties and responsibilities of deputy commissioners, relative to hearings, have been vested in hearing examiners (administrative law judges). Pursuant to all of the foregoing, it is determined that Employer has not been prejudiced by Claimant's failure to give the notice required by Section 12 of the Act.

Accordingly, it is concluded that, although Claimant did not give Employer the required notice, his claim is not barred; Employer had knowledge of Claimant's injury and Employer has not been prejudiced by Claimant's failure to give the notice.

On brief, Employer also noted that, under Section 13 of the Act, the right to compensation for disability is barred unless a claim therefore is filed within one year after an injury. Employer represented that the filing requirement is jurisdictional, that Claimant did not comply with the requirement, and that failure of compliance results in entitlement to compensation being barred by operation of law. On brief, Claimant maintained that the right to compensation was not barred. Claimant submitted that the claim was filed within the prescribed year and that, by reason of Employer's failure to comply with the reporting requirements of Section 30(f) of the Act, the one-year statute of limitations never became operative. Claimant's posture relative to filing within a year of the injury is rejected. The posture relative to Section 30(f) is adopted.

Section 30(f) provides that, where an employer has knowledge of an injury and fails to file a required report with the Secretary of Labor, the limitation on time for filing a claim shall not begin to run until the required report is filed. Employer's argument that it had no chargeable knowledge of Claimant's injury has been found to be without merit during discussion of the notice re-

quirement. For the reasons set forth therein, the argument is found to be without merit when applied to the report requirement of Section 30. The record is barren of evidence that Employer filed the Section 30 report prior to March 8, 1974. Accordingly, it is concluded that operation of the statute of limitations in Section 13 of the Act does not bar Claimant's right to compensation.

Precedent establishes the proposition that entitlement to compensation for an occupational disease or infection requires that an employee be exposed to hazards greater than those involved in ordinary living and contraction of the disease or infection (injury) therefrom (*Grain Handling Co. v Sweeney*, 102 F. 2d 464, CA 2-1939; certiorari denied, 60 S. Ct. 83, 308 U. S. 70, 84 L. Ed. 478). Such occurs when there appears to a rational mind, after consideration of all circumstances, a causal connection between the conditions under which an employee works and the injury (*Michigan Transit Corp. v. Brown*, 56 F. 2d 200, D. C., Mich.-1929).

The record developed herein reveals that, as a sandblaster, exposed to processes involving use of sand, "Black Beauty" and/or "Poly-Grit", Claimant was exposed to other than normal hazards for approximately 20 years. By his estimate, he performed sandblasting duties 60% of the time. By Employer's estimate, he was so engaged 30% of the time. There is no evidence that, prior to the time Claimant began working for Employer, he experienced symptoms developed during the period of employment.

Recognition is accorded evidence that sand has not been used in blasting operations for more than 10 years prior to the hearing, that the grits presently used in blasting operations contain no free silica, and that substances in "Black Beauty" and "Poly-Grit" are incapable of producing silicosis or "disabling pneumoconiosis". Claimant's physician made no positive diagnosis of silicosis but he

did diagnose a Stage 2 pneumoconiosis related to inhalation of "Black Beauty" and silica. Absent a definition of "disabling", it appears to be reasonable to conclude that inhalation of the substances in "Black Beauty" and "Poly-Grit" can cause pneumoconiosis that is not disabling. Because each individual is unique so far as his reactions to disease and infection are concerned, no basis appears to adopt the proposition that a pneumoconiosis resulting from inhalation of sandblasting grits will never be medically or industrially disabling to everyone. Such a proposition is rejected. Overriding the foregoing is recognition of the evidence of record that Employer attributed Claimant's lung condition to sandblasting activities.

That the pneumoconiosis experienced by Claimant is disabling is evidenced by Employer's and Claimant's physicians' opinions. After the 1972 X-rays, Employer found the condition to be sufficiently disabling as to render Claimant unfit to perform blasting work. Claimant's physician found the condition to be related to work and he advised against future exposure to irritants such as dust and fumes. The fact of an existing disability is not compromised by the fact that Claimant has lost no time from work; since the X-rays, he has been given work that does not expose him to irritants and he has not been allowed to sandblast.

Whereas the record is considered to contain substantial evidence that Claimant sustained pneumoconiosis that arose naturally out of his work for Employer, it is found to contain no substantial evidence that the condition did not so arise. Again, precedent indicates that, in the absence of substantial evidence to the contrary, a disability occurring in the course of employment must be presumed to have arisen out of such employment (*American National Red Cross v. Hagen*, 327 F. 2d 559, CA 7-1964). It is concluded that Claimant sustained disabling pneumo-

coniosis that arose naturally out of employment by Employer.

Relative to the nature and extent of the disability, evaluation of the record dictates that it is permanent in nature. Competent medical opinion indicates that no treatment or therapy will so affect Claimant's condition as to make it medically feasible for him to resume sandblasting activities. As a consequence, because of work-related pneumoconiosis, Claimant has lost the capacity to earn the wages he was receiving as a sandblaster at the time he contracted pneumoconiosis.

Relative to the extent of the disability, recognition is made of the proposition that the concept of disability is an economic concept based on a medical foundation (*Perini Corp. v. Heyde,* 306 F. Supp. 1321, D. C., R. I.-1969). The pertinent test is the measure of an injured employee's ability to earn wages after an injury; it is not the measure of actual earnings after an injury (*Owens v. Traynor,* 274 F. Supp. 770, D. C., Md.-1966; affirmed 396 F. 2d 183; certiorari denied, 89 S. Ct. 401, 393 U. S. 962, 21 L. Ed. 2d 375). In the instant matter, it is obvious that, since the injury, Claimant has been able to continue work in the ship construction industry. His ability to earn a living therein has been limited by an incapacity to compete for work as a sandblaster and a necessity to work at jobs that pay less than jobs including sandblasting duties. Measured in terms of his earning capacity in October 1972, Claimant's injury has cost him the capacity to compete for work then paying $4.19 an hour and limited him so that he is competitive only for work then paying a lesser amount than $4.19. As of October 9, 1972. Claimant's earning capacity was reduced by approximately 21% (from $4.19 to $3.325 an hour).

Given Claimant's age, education and work history, and coupling it with recognition of the fact that he has

not undergone formal vocational retraining experiences, 20% constitutes a supportable measure of Claimant's loss of capacity to earn the wages he was earning in the ship construction industry at the time of his injury.

Development of the foregoing posture by the administrative law judge has not been accomplished without having considered Employer's causation arguments on brief. As to that matter, Employer submitted that no record evidence supports a finding that Claimant's condition is work-related. In support of the submission, it referenced the non-use of sand for blasting purposes, the chemical analysis of blasting grits and the evaluation of that analysis. Prior elements hereof reflect the administrative law judge's rejection thereof and the reasons therefor.

Further, Employer submitted that attribution of the lung condition to black grit, by Claimant's physician, is of little probative value when it is noted that he was not aware of the nature of the material and when it is weighed against the conclusion, by Employer's analyst, that the tested substances are not "capable of causing pneumoconiosis". The submission is not persuasive. The administrative law judge adopts the concept that any gritty substance, when introduced into a person's environment under pressure, is capable of producing lung damage. Significantly, the analyst's conclusion was misquoted by Employer. The conclusion related to "disabling pneumoconiosis".

The administrative law judge also considered Employer's argument that Claimant is not disabled. For reasons now hoped to be apparent, the submission, that no record evidence supports a finding that Claimant's earning capacity has been diminished, is rejected. The submission that the opinion of Claimant's vocational specialist should not be controlling, in a determination of extent of disabil-

ity, is meritorious. As should now be obvious, the extent of disability was measured by comparing capacities immediately before and immediately after discovery of the lung condition. Such a method of measurement is considered to be consistent with the legislative history and statutory provisions, relating to earning capacity, referenced by Employer on brief. It is not consistent with the argument that there has been no loss of capacity because there has been a post-injury increase in amount of earnings. That argument is rejected because, on the basis of the factual situation herein, it is determined that post-injury wages, standing alone, do not represent wage earning capacity. Finally, in view of the fact that there has been a finding of disability herein, Employer's references to and quotations from *Welch v. Leavey,* CA 5, 397 F. 2d 189 (1968), support the posture assumed by the administrative law judge.

At the hearing, the parties stipulated that Claimant's average weekly wages on October 9, 1972, totalled $158.79. Documentation submitted indicates that Claimant earned $8257.20 in 1972. Evaluation of that amount, along with all hourly and annual wage figures that were submitted for the period from 1970 through 1975, reveals that it provides a reasonable and fair method of arriving at Claimant's average weekly wages. Accordingly, it is concluded that, on October 9, 1972, Claimant's average weekly wages totalled $158.79.

Findings of Fact

1) On October 9, 1972:

A) Claimant was employed by Employer as a cleaner/sandblaster and, as such, was engaged in activities attending the construction of a ship at Employer's shipbuilding facility.

B) Employer was engaged in the shipbuilding business and had employees engaged in that facility at which Claimant was employed.

C) While performing assigned shipbuilding duties at the facility where Employer had a ship under construction, Claimant was found by Employer to have a lung condition that subsequently was diagnosed as pneumoconiosis, which lung condition is attributable to the environment in which Claimant performed sandblasting duties for Employer.

D) On the basis of previous earnings in the employment in which he was working at the time he incurred the occupational disease, Claimant's average weekly wages totalled $158.79.

2) As a consequence of the illness and since October 9, 1972, Claimant suffered a permanent, partial (20%) incapacity to earn the wages that he was receiving, at the time of the onset of the illness, in the same or any other employment.

Conclusions of Law

1) On October 9, 1972:

A) Claimant was a person engaged in maritime employment.

B) Employer had employees who were employed in maritime employment upon the navigable waters of the United States.

C) Claimant incurred an occupational disease that arose naturally out of his employment by Employer.

2) As a consequence of the occupational disease and since October 9, 1972, Claimant has suffered a permanent 20% partial disability.

Decision

On October 9, 1972, Claimant incurred an occupational disease that arose naturally out of his employment by Employer, as a consequence of which he has, since that date, experienced a permanent 20% partial disability.

Claimant's failure to give Employer the notice of injury required by 33 U. S. C. 912 does not operate to bar his claim under the Act.

The one-year period of limitation for filing claims, set forth in 33 U. S. C. 913, did not begin to run prior to the date Claimant filed his claim herein.

Order

That Employer pay Claimant compensation for permanent 20% partial disability, beginning October 10, 1972, based on then average weekly wages totalling $158.79.

That, as to any installment of compensation required to be but not paid within 14 days from the due date, Employer pay Claimant an additional amount equal to 10% of any such installment.

That, as to any installment of compensation not paid when due, Employer pay Claimant interest at an annual rate of 6% until date of payment.

/s/ DAVID W. PELKEY
David W. Pelkey
Administrative Law Judge

DATED: February 19, 1976
Washington, D. C

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

CASE NOS. 76-LHCA-27
76-LHCA-28
76-LHCA-29

In the Matter of:

JAMES L. BENNETT
LEROY BROOKS
ROBERT N. MURPHY

Claimants

v.

SUN SHIPBUILDING AND DRY DOCK CO.
Employer

SELF-INSURED

SUPPLEMENTAL DECISION AND ORDER

A separate Decision and Order was issued on February 19, 1976, for each claim now incorporated herein. On February 27, 1976, the administrative law judge received Claimant's separate petitions for allowance of costs, expenses and attorney's fees attending the claims.

On March 12, 1976, the administrative law judge received Employer's consolidated reply to the petitions. Therein, Employer proposed that all claims had involved virtually identical factual situations and issues of law; noted that Claimant's counsel had submitted a single post-hearing brief in support of the three claims; submitted that the separate petitions contained 12 items of costs and services that were identical; and represented that, to the ex-

tent that the petitions requested "triple recovery" as to those 12 items, the requests were unreasonable.

The manner in which the three claims have been processed by the parties and the administrative law judge during and since the preliminary hearings establishes the proposition that efforts in pursuit of one claim served to benefit all claims. Notably, each of the petitions requests reimbursements to "James L. Bennett." In view of the foregoing and after examination and evaluation of the contents of the petitions, Employer's representation is adopted.

The examination and evaluation of the petitions and the reply thereto result in determinations of allowance and approval of the following:

A) In each claim, reimbursement of the cost of services rendered by Dr. Peter A. Theodos; and reimbursement of the $5.00 and $.90 costs for a medical report and reproduction of documents in the *Brooks* claim.

B) An expert witness fee for Dr. Saul Leshner, for testimony, of approximately two hours' duration, in the three claims.

C) Costs of the reporter's services, in the three claims.

D) Compensation for a total of 38.5 hours of legal services devoted to the three claims.

E) Compensation for a total of 15 hours of paralegal services devoted to the three claims.

ORDER

Accordingly, it is ordered that Employer:

A) Reimburse James L. Bennett, Leroy Brooks and Robert N. Murphy $175, $100 and $115, respectively, such sums representing fees paid to Dr. Peter A. Theodos.

B) Reimburse Galfand, Berger, Senesky, Lurie and March, Attorneys at Law:

1) $225.00, such sum representing total compensation due Dr. Saul Leshner as an expert witness at the hearings on the merits of the three claims;

2) $5.90 for medical report and reproduction costs incurred in the *Brooks* claim;

3) $109.76 for costs incurred with Metropolitan Reporter Service for transcripts of the hearings in the three claims;

C) Pay Galfand, Berger, Senesky, Lurie and March, Attorneys at Law:

1) $2,310.00 for legal services, totalling 38.5 hours, rendered in the three claims;

2) $450 for paralegal services, totalling 15 hours, rendered in the three claims.

/s/ DAVID W. PELKEY
David W. Pelkey
Administrative Law Judge

DATED: March 19, 1976
Washington, D. C.

U. S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
WASHINGTON, D. C. 20210

BRB Nos. 76-201
76-202
76-203

JAMES L. BENNETT
ROBERT N. MURPHY
LEROY BROOKS
Claimants-Respondents

v.

SUN SHIPBUILDING & DRY DOCK COMPANY
Self-Insured Employer-
Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

DECISION

Appeals from the Decisions and Orders of David W. Pelkey, Administrative Law Judge, United States Department of Labor.

Paul J. Senesky (Galfand, Berger, Senesky, Lurie & March), Philadelphia, Pennsylvania, for the claimant.

John J. Runzer & Joseph F. Moore, Jr., (Pepper, Hamilton & Scheetz), Philadelphia, Pennsylvania, for the employer.

Mary A. Sheehan (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D. C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

HARTMAN, Member.

These are appeals by the employer from the Decisions and Orders (76-LHCA-27, 76-LHCA-28 & 76-LHCA-29) of Administrative Law Judge David W. Pelkey pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. § 901 *et seq.* (hereafter referred to as the Act). These cases have been consolidated on appeal.

Bennett who was fifty-five years old at the time of the hearing had worked for employer for eighteen years. Initially, claimant worked exclusively as a cleaner, but from 1962 to 1972, he also worked at blasting duties. Claimant testified he would blast three to four days a week. Aside from the blasting, claimant's duties as a cleaner included janitorial work, lumber sorting, and gas-freeing of fuel oil tanks. In October 1972, claimant was informed by employer that his chest x-rays had revealed the presence of spots on his lungs. Accordingly, he was removed from blasting duties although he remained working in employer's cleaning department. In January 1974, claimant was informed by Dr. Theodos that he was suffering from pneumoconiosis as a result of his blasting duties. Claimant stated at the hearing that he has lost no time because of this condition, but that he does experience coughing spells and shortness of breath.

Murphy who was fifty-seven years old at the time of the hearing had been employed by Sun Shipbuilding as a cleaner-blaster since 1952. He testified that he performed blasting duties about three times a week. Like Bennett, he was informed by employer in October 1972 that his lungs were spotted up, and he was removed from blasting duties. He continued working as a general cleaner until early 1975 at which time he was transferred. At the time of the hearing, he was working as a third class mechanic operating a grinder machine in employer's boiler shop. Murphy was also diagnosed by Dr. Theodos in January 1974 as suffering from pneumoconiosis, possibly silicosis, as a reaction to his blasting duties.

Brooks who was forty years old at the time of the hearing began working for employer in 1956 as a cleaner. He was first assigned to blasting work in 1960; and testified that he generally blasted three to four times a week. He was removed from blasting duties in October 1972 because of his chest x-rays. He indicated that at that time he was not informed his lung condition was in any way causally related to his employment. However, Brooks did make a doctor's appointment for January 1973 concerning this chest x-ray, but he failed to keep the appointment. Like Bennett and Murphy, Brooks was also diagnosed by Dr. Theodos, a physician to whom they had been referred by their attorney, as suffering from pneumoconiosis. Brooks at the time of the hearing was no longer working in the cleaning department but was doing inventory work in employer's storeroom. It was not known if this was to be a permanent position.

The administrative law judge found that each claimant's lung condition was causually related to his employment. He awarded to each compensation for a twenty percent permanent partial impairment as of October 10, 1972.

Employer appeals contending that the administrative law judge erred (1) in finding that Bennett's and Brooks' lung conditions were causally related to their employment, (2) in finding that Bennett, Murphy, and Brooks had sustained a loss in wage-earning capacity because of their lung conditions, (3) in finding that Bennett, Murphy and Brooks had sustained a twenty percent permanent partial disability and (4) in not barring Brooks' claim for failure to give proper notice of injury under Section 12 of the Act, 33 U. S. C. § 912.

Employer first contends that the administrative law judge erred in finding that Bennett's and Brooks' lung conditions were causally related to their employment. Employer, while noting there is a statutory presumption that a claim comes within the provisions of the Act, 33 U. S. C. § 920(a), argues that this presumption has been rebutted by substantial evidence.

On the issue of causation, claimants introduced the report of Dr. Theodos who attributed their pneumoconiosis to the inhalation of "black beauty," a material used in the blasting process. Dr. Theodos noted that the nature of this blasting material was unknown to him. Employer responded by submitting a chemical analysis of "black beauty" and "poly-grit" showing that neither of these blasting substances contained any free silica. Further, employer submitted a report by a Dr. Sokoloff that stated these materials

> . . . are incapable of producing silicosis when inhaled. Neither do they contain any fibrogenic substance, which is capable of producing disabling pneumoconiosis.

The administrative law judge accepted Dr. Sokoloff's report for the proposition that these substances can cause pneumoconiosis that is not disabling. However, it would

appear to the Board that such an interpretation of this report is clearly contrary to the main thrust of the report.

This, however, does not negate the administrative law judge's conclusion that claimants' lung conditions were related to their employment. The administrative law judge, in addition to finding there was substantial evidence to support a finding that claimants' lung conditions were causally related to their employment, also found that there was not substantial evidence in the record to demonstrate that claimants' lung conditions did not arise out of their employment. The Board agrees with this finding.

The statutory presumption under Section 20 applies as much to the nexus between an employee's malady and his employment activity as it does to any other aspect of his claim. This presumption may be dispelled by circumstantial evidence but such evidence must be specific and comprehensive enough to sever the potential connection between an injury and the employment. While rebuttal evidence may be hard to develop, the presumption reflects a strong legislative policy favoring awards in arguable cases. *Swinton v. J. Frank Kelly, Inc.*, No. 74-1164 (D. C. Cir. Feb. 3, 1976), *cert. denied*, — U. S. —, 97 S. Ct. 67 (1976).

The medical evidence submitted by employer only concerned the composition of the black grit used in the blasting process. Nowhere in the record is there evidence that would rule out a causal connection between claimants' lung conditions and their exposure to dusty conditions caused by the blasting operations, the possibility of a reaction to the materials claimants were removing from the ships by the blasting process or by exposure to conditions when the gas freeing of oil tanks was being done. While the Board does not find any one of these elements were responsible for claimants' lung conditions, it cites these elements to illustrate that employer, by merely in-

troducing evidence on the composition of the grit used in the blasting process, has not introduced substantial evidence to rebut a presumption that claimants' lung conditions were causally related to their employment. Further, employer introduced no medical evidence nor did it develop testimony that claimants' lung conditions may be the result of factors not related to their employment.

Employer next argues that the administrative law judge erred in awarding compensation under Section 8(c)(21) of the Act, 33 U. S. C. § 908(c)(21), in that it alleges that claimants' lung conditions have not resulted in any loss in work time and that their actual hourly wages have increased since the discovery of their lung condition and their removal from blasting work.

Section 8(c)(21) mandates a compensation rate based on 66⅔ per centum of the difference between a claimant's average weekly wage at time of injury and his wage-earning capacity after the injury. However, Section 8(h) of the Act, 33 U. S. C. § 908(h), provides that if a claimant's actual post-injury earnings do not fairly and reasonably represent his wage-earning capacity, the administrative law judge may "fix such wage-earning capacity as shall be reasonable." Various factors must be considered. He must gauge earning capacity on the claimant's ability to earn wages in the open market, not the wages actually received. *Silberstein v. Service Printing Co.*, 2 BRBS 143, BRB No. 75-144 (Aug. 14, 1975). Further, he must look at those factors that might affect a claimant's capacity to earn wages in his physically disabled condition at a future date. For instance, he must consider the possibility that claimant might lose his job and, thus, consider the availability of similar employment for a person in claimant's physical condition. *Sursum Corda, Inc. v. Cooper*, 1 BRBS 60, BRB No. 74-113 (Aug. 6, 1974). When factors such as these are considered, it

has often been held that the claimant is permanently partially disabled even though his post-injury wages are greater than his previous average weekly wage. *Kendrick v. Bethlehem Steel Corp.*, 3 BRBS 164, BRB No. 75-232 (Jan. 19, 1976).

There can be no dispute that claimants are no longer able to work as blasters due to their lung conditions. They are also precluded from working in an atmosphere where dusts or fumes are present. Further, a vocational rehabilitation specialist stated that as a result of their lung conditions and other factors that Bennett had a 60 percent disability, 30-33 percent attributable to his age and lung condition, and a third of that 30-33 percent attributable to the lung condition alone; that Murphy had a 28-30 percent disability attributable to his age and lung condition; and that Brooks had a 25 percent disability. Considering all these factors, the Board finds that the administrative law judge could find claimants disabled even though they lost no actual time from work and even though their wages were higher than before their injury.

However, it would appear that the administrative law judge erred in his computation of the extent of permanent partial disability. Section 8(c)(21) provides:

> . . . the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter. . . .

Rather than comparing the average weekly wage prior to injury and the wage-earning capacity thereafter, the administrative law judge appears to have compared the claimants' wage-earning capacity before injury with their wage-earning capacity after the injury.

For example, in his Decisions and Orders, the administrative law judge stated:

> . . . measured in terms of his earning capacity in October 1972, [Claimant's] injury has cost him the capacity to compete for work then paying $4.19 an hour and has limited him so that he [is competitive] only for work then paying $3.325 an hour. As of October 9, 1972, Claimant's earning capacity in ship construction was reduced by approximately 21% (slightly different wording in *Murphy*).
>
> As should now be obvious, the extent of disability was measured by comparing capacities immediately before and immediately after discovery of the lung condition.

The record, however, clearly shows that none of these claimants actually performed blasting work on a full-time basis. Therefore, the figure that the administrative law judge applied that should have represented claimant's pre-injury average weekly wage is inaccurate. Both the figure for the percentage of disability and the figure for the rate of compensation must be based on claimant's average weekly wage, and not on wages they might have earned if they had been blasting fulltime. Therefore, the Board remands the case to the administrative law judge for clarification and modification of his findings as to the extent of disability in accordance with Section 8(c)(21).

The administrative law judge also excused Brooks' failure to give timely notice of injury under Section 12(d)(1), 33 U. S. C. § 912(d)(1), concluding that (1) employer had knowledge of the injury in October 1972 at which time it should have recognized a relationship between Brooks' employment and the x-ray findings and (2) that employer was not prejudiced by lack of formal notice. Employer argues that such a determination on the administrative law judge's part was error.

Employer contends that it could not be expected to have recognized a possible relationship between Brooks' employment and his 1972 x-ray showing spots on the lungs. It also argues that the administrative law judge's conclusion that employer should have been aware that blasting causes dust and dust causes lung problems is without evidentiary support in the record. Further, employer in arguing that it should not have inferred the possibility of a work related injury from the 1972 x-ray points to its reliance on reports stating that the grit used in the blasting process cannot cause silicosis or disabling pneumoconiosis. In support of its contention, employer cites the holding in *Sun Shipbuilding & Dry Dock Co. v. Bowman*, 507 F. 2d 146 (3rd Cir. 1975), that an employer cannot be said to have knowledge of an injury when it has "no reason to know it is the party responsible for the injury or ailment of a particular employee." In *Bowman*, the court found that the employer did not have knowledge of a work related hearing loss of an employee who began working for employer with "a marked hearing impairment," having worked for twenty years for prior employers being exposed to the same acoustic trauma, from the fact that claimant worked with noisy machines and was required to wear protective head gear.

In this case, Brooks who was forty years old at the time of the hearing had worked for employer since 1959. Unlike the claimant in *Bowman*, Brooks had no long history of prior employment before he began working for employer. Claimant also testified he began blasting work in 1960. It appears that the use of grit in the blasting process did not begin until approximately ten years prior to the discovery of claimant's lung condition in 1972. Claimant during part of his employment had worked in an environment that the record would indicate was hazardous. Claimant while blasting was required to use a respirator suggesting the atmosphere was dusty.

The Board finds that the administrative law judge properly found the employer should have had knowledge of Brooks' injury and its possible relationship to his employment in October 1972. In so finding, the Board notes that the Supreme Court in *Urie v. Thompson*, 337 U. S. 163 (1949), a case under the Federal Employer's Liability Act involving a locomotive fireman who was exposed to silica dust from sand, stated that "it is a matter of common knowledge that it is injurious to the lungs and dangerous to health to work in silica dust, a fact which [employer] was bound to know." Claimant in this case, it would appear from the record, may have spent several years blasting using sand before grit that allegedly cannot cause silicosis or pneumoconiosis was introduced. Likewise, it should be considered a matter of common knowledge that blasting causes dust (or else why would respirators be used) and that the constant inhalation of dust is not beneficial to one's health. Certainly, employer should have surmised that spots appearing on the lungs of a relatively young employee who had spent most of his working years with employer and who often did blasting work may well be causally related to this employment.

Further, employer has also failed to show that it has been prejudiced by claimant's failure to give written notice to employer. *See Leyden v. Capitol Reclamation Corp.*, 2 BRBS 24, BRB No. 74-226 (June 24, 1975); *aff'd*, No. 75-1780 (D.C. Cir. Jan. 26, 1977). Therefore, the Board finds that the administrative law judge properly excused claimant's failure to give notice pursuant to Section 12(d)(1).

The claimants' attorney has requested approval of a fee for services successfully rendered in these appeals. Having submitted to the Board a statement of the extent and character of the necessary legal services rendered, in accordance with the applicable Rules and Regulations, 20

C. F. R. §§ 702.132, 802.203, the claimants' attorney is awarded a fee of $450.00 to be paid by the employer in a lump sum directly to the claimants' attorney.

Accordingly, the Board reverses the administrative law judge's findings as to extent of permanent partial disability and remands the cases for clarification and modification of his findings on this issue in accordance with Section 8(c)(21). In all other respects, the Decisions and Orders are affirmed.

/s/ RALPH M. HARTMAN
Ralph M. Hartman, Member

We Concur: /s/ RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

/s/ JULIUS MILLER
Julius Miller, Member

Dated this 21st day
of March, 1977

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

CASE Nos. 76-LHCA-27
76-LHCA-29
76-LHCA-28

OWCP Nos. 3-6374
3-6412
3-6377

In the Matter of:

JAMES L. BENNETT
ROBERT N. MURPHY
LEROY BROOKS,

Claimants

v.

SUN SHIPBUILDING & DRY DOCK CO.,
Employer

SELF-INSURED

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For the Employer

Before: DAVID W. PELKEY
Administrative Law Judge

DECISION ON REMAND

In a March 21, 1977, Decision (BRB Nos. 76-201, 76-202 and 76-203), the Benefits Review Board (Board) reviewed my February 19, 1976, Decision and Order in each claim. The Decision noted Employer's argument that, because the claimants' lung conditions resulted in no loss of work-time and because their hourly wages increased after the discoveries of the lung conditions, I "erred in awarding compensation" under 33 U. S. C. 908(c)(21) (hereafter 8(c)(21)). (That statutory provision covers the basis on which compensation for permanent partial disability is to be computed for non-schedule losses). The notation was followed by a discussion of factors to be considered during computation of the amount of compensation to be paid for a non-schedule permanent partial disability. The discussion was followed by a finding that Employer's argument did not preclude an award of compensation for such a disability.

Thereupon, the Board observed that I appeared to err in my "computation of the extent of permanent partial disability" in each claim. In connection with the observation, the Board referenced the 8(c)(21) requirement that compensation be ⅔ of the difference between average weekly wages and wage-earning capacity after an injury. It quoted from so much of each Decision and Order as contained my comparison of each claimant's capacity to compete for work, in the ship construction industry, at the time of his injury with his capacity to compete for work in that industry after his October 1972 injury. That comparison was made during my discussion of the extent of each claimant's disability and it followed my finding that each had suffered a disability that was permanent in nature. The language in the Decision of the Board follows:

> "* * * measured in terms of his earning capacity in October 1972, [Claimant's] injury has cost him the capacity to compete for work then paying $4.19 an hour and has limited him so that he [is competitive] only for work then paying $3.325 an hour. As of October 9, 1972, Claimant's earning capacity in ship construction was reduced by approximately 21%. (Slightly differed wording in *Murphy*)"

Next, the Board quoted language that I used in each Decision and Order, which language was not used in connection with my discussion of the merits or measurement of each claim for permanent partial disability. Rather, I used the language in connection with my treatment of Employer's argument, on brief, that the opinions of a vocational specialist who testified at the hearings should not be controlling in determinations of extent of disability experienced by the claimants. That language, reflecting my agreement with the argument was:

> "As should now be obvious, the extent of disability was measured by comparing capacities immediately before and immediately after discovery of the lung condition."

After setting forth the two quotations, the Board noted that no claimant worked full-time at sandblasting work that paid $4.19 an hour. It found that I erroneously used the $4.19 amount as each claimant's pre-injury average weekly wage. It stated:

> "Both the figure for the percentage of disability and the figure for the rate of compensation must be based on claimant's average weekly wage, and not on wages they might have earned if they had been blasting fulltime."

Thereupon, the Board reversed my findings as to the extent of permanent partial disability and remanded the cases for "clarification and modification of his findings on this issue in accordance with Section 8(c)(21)."

Pursuant to the Board's remand, a June 2, 1977, hearing was conducted in accordance with 5 U. S. C. 554.

Statement of the Case

At the hearing, no testimony was offered by the claimants and the claimants' attorney objected to admission of additional testimony by Employer. The objection was overruled. Employer tendered testimony by each claimant's supervisor and a counseling psychologist, identified as a rehabilitation specialist.

A foreman in the Cleaning Department testified that Bennett's janitorial duties include some that cause dust but none that exposes him to fumes, other than when he occasionally cleans oil tanks. He noted that Bennett received premium pay for time spent cleaning tanks.

A lead supervisor in the Labor Department described Brooks' duties as a laborer for the last eight years. He noted that Brooks performs some "dirty work" for which he receives premium pay. The witness said that the claimant's duties had been changed only so far as required by a disqualification for blasting work.

A lead supervisor in the Boiler Shop testified that he has supervised Murphy, in performance of duties as a grinder (2d class boilermaker), since March 1975. He represented that grinding operations dictate the claimant's use of a mask because of exposure to substances resembling dust, smoke and vapor. The witness said that he has not been told that Murphy was not to be exposed to dust and fumes, that Murphy does all assigned tasks and that he works overtime when such is required.

The psychologist testified from and in support of May 31 and June 1, 1977, reports he prepared on the

claimants. The reports were based on examination of documentation and they were designed to reflect the transferability of the claimants' skills. They set forth the jobs each employee had performed for Employer. They contained evaluations of the mental and physical requirements attending work as a porter in any industry; a laborer in a shipyard; a sandblaster in any industry; a storekeeper in water transport industry; and a grinder-chipper in any industry.

The witness identified a number of positions, in manufacturing and production industries in the Delaware Valley, that had been available since 1972 and that fell within the training and skill capabilities of the claimants. He stated that, as to the majority of such jobs, the claimants' lung conditions constituted "zero disability." At the same time, the counselor acknowledged, atmosphere conditions and the lung conditions would combine to render 15 percent to 20 percent of such positions unavailable to claimants.

The psychologist noted that wages in the shipbuilding industry, in the Philadelphia area, were higher than wages in most industries. He admitted that the wages the claimants earned working for Employer were higher than laborer wages "in any other industry" in the Philadelphia area.

The witness concluded that all claimants had the same transferable skills. On the basis thereof and consideration of factors that included the pulmonary diseases, ages, education, experience, residual physical capacities, labor market statistics and other professional resource materials, he submitted that claimants' wage-earning capacities in 1973 totalled $165.45 per week. The witness submitted that the capacities totalled $176.40 in 1974; $185.00 in 1975; $208.96 in 1976; and $220.00 in 1977.

Discussion

I read the Board's reversal of my findings as to extent of disability as being reflective of the Board's adoption of the proposition that the language quoted from each Decision and Order reflected the sole criterion I used in reaching my determination of the extent of disability suffered by each claimant, i.e., a permanent 20 percent partial disability. I find support for such adoption when the language quoted from my discussion of Employer's argument on brief is not read in connection with the contents of the earlier quotation from my discussion of the extent of disability (following my finding of a disability that was permanent in nature). I failed, clearly, to identify and to associate the latter-quoted language with the earlier-quoted language.

In my discussion of the extent of each claimant's disability, I identified some of the factors set forth in the record that I found reasonably supported the conclusion that the claimant suffered a 20 percent partial disability (using "disability" in the context set forth in 33 U. S. C. 902(10), i.e., an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment"). For each claimant, the following factors were included: the incapacity "to compete for work" paying $4.19 an hour as a sandblaster in the ship construction industry; the capacity "to compete for work" paying $3.325 as a general laborer in the ship construction industry; age; education; and work history. In addition and for Bennett, consideration was given to the lack of vocational retraining experiences and the lack of foreseeable opportunities for such retraining experiences. For Brooks, the lack of formal vocational retraining experience was persuasively considered and his 10-week detail to inventory-type work was considered and

found not to be persuasive as factors contributing to disability. Murphy's lack of formal vocational retraining experience was considered as a factor contributing to his disability.

In summary, my use of the term "capacity" in the quoted portions of each Decision and Order related that word to capacity to compete for work in the ship construction industry. The term did not relate to the 8(c)(21) "wage-earning capacity thereafter in the same employment or otherwise" or to the 33 U. S. C. 908(h) (hereafter 8(h)) "wage-earning capacity of an injured employee." The "approximately 21 percent" reduction in capacity related to the capacity to compete for work in the ship construction industry. It represented but one factor that I used in effecting the determination, in each claim, that the claimant suffered a 20 percent disability—loss of capacity to earn the wages he was receiving, at the time of his injury, in the same or any other employment.

In view of the foregoing undertaking-to-clarify, I am confident that the Board no longer will find the quoted language to be objectionable or to be legally unsound. Additionally, I am confident that, with its recognition of the fact that the quoted language did not reflect my use of each claimant's pre-injury capacity to earn a living in the open labor market as one of two elements of a sole criterion to measure the extent of his disability (20 percent partial), the Board will no longer mandate that my measurement of that disability "be based on claimant's average weekly wage."

The Board found error only in, what it identified as, an inaccurate "pre-injury average weekly wage" in its review of my computation of the extent of each claimant's disability. Clarification has been effected to eliminate any such error as may have been made. I hasten to add that, in each Decision and Order, a specific amount was clearly

identified as the only average weekly wage with which I was concerned. There is record evidence that Employer has used such amount in effecting compensation payments to each claimant.

Accordingly, on the basis of the record established prior to my Decision and Order in each claim, need to modify my determination of extent of disability is not indicated.

At the June 2, 1977, hearing, the attorney for the claimants indicated that the Board's remand required only a determination of the figures to be used, pursuant to 8(c)(21), to compute the amount of weekly compensation to be paid to each claimant on and from October 10, 1972. He adopted the posture that an unchallenged average weekly wage at the time of the October 9, 1972, injury had been established for each claimant. He noted that, immediately after the injury, the 40-hour-week pay of each claimant was $133.00. He adopted the posture that the provisions of 8(h) should be used as guidelines to determine whether the $133.00 or some other amount fairly and reasonably represented each claimant's post-injury wage-earning capacity. He offered no direct evidence bearing thereon.

At that hearing, Employer's attorney submitted that the Board's remand required that I redetermine the extent of each claimant's disability. He noted the Board's decision that my calculation of the extent of disability was incorrect in that it utilized pre-injury wage-earning capacity as opposed to average weekly wages. Significantly, counsel added:

> "In addition, however, it is the Employer's position that the administrative law judge must consider the actual wages not just the day or week after the injury, but what the man's track record, so to speak, has

> shown his wage-earning capacity to be in the real world, in the labor market post injury taking into consideration his age, his experience, skills or lack thereof and post injury physical condition among other things" (Transcript, Pg. 9).

Employer's evidence at the June 2 hearing was directed toward the subject matter of the quotation, i.e., whether there have been changes in the claimants' wage-earning capacities since the October 9, 1972, injuries.

I find no need to discuss so much of the foregoing as relates to my recomputation of the extent of each claimant's disability. The record should now establish that my determination of extent of disability did not utilize pre-injury wage-earnings capacity instead of average weekly wages.

However, I find need to discuss the parties' submissions that I reconsider the claimants' post-injury wage-earning capacities. The need arises out of my observation that the Board's Decision followed its reference to my error in computation of the *extent* of permanent partial disability with a quotation of so much of 8(c)(21) as prescribes the formula for computation of the *dollar amount* of compensation to be paid for a non-schedule permanent partial disability. My observation well might support an inference, by the parties and by me, that the Board suggested computation or recomputation of the amount of compensation due and payable to each claimant.

I find reconsideration of post-injury wage-earning capacity to be beyond the scope and the mandate of the Board's remand. In its Decision, the Board made no mention of error in my treatment of the concept of post-injury wage-earning capacity. The remand did not mention my treatment thereof. The Decision and remand involved

only, what the Board found to be, my failure to address the concept of average weekly wages in effecting a determination of extent of disability in each claim.

Decision

After remand, hearing, amplification of the record, and evaluation of the contents of the record, I adopt, without modification, the finding of extent of disability in my February 19, 1976, Decision and Order in each claim.

/s/ DAVID W. PELKEY
David W. Pelkey
Administrative Law Judge

Dated: July 13, 1977
Washington, D. C.

U. S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
Washington, D.C. 20210

BRB Nos. 77-511,
77-512,
77-513

JAMES L. BENNETT,
ROBERT N. MURPHY, and
LEROY BROOKS
Claimants-Respondents

v.

SUN SHIPBUILDING & DRY DOCK COMPANY
Self-Insured Employer-Petitioner

DECISION

Appeal from the Decision and Order on Remand of David W. Pelkey, Administrative Law Judge, United States Department of Labor.

Thomas E. Zemaitis, John J. Runzer and Joseph F. Moore, Jr. (Pepper, Hamilton & Scheetz), Philadelphia, Pennsylvania, for the employer.

Before: SMITH, Chairman, and MILLER, Member.

MILLER, Member:

This is an appeal by employer from the Decision and Order on Remand of July 13, 1977 of Administrative Law Judge David W. Pelkey pursuant to provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. § 901 *et seq.* (hereinafter re-

ferred to as the Act). These three cases (76-LHCA-27, 76-LHCA-28, and 76-LHCA-29) were consolidated on the initial appeal to the Board and remained so for the subsequent determination on remand by the administrative law judge.

The facts of each case were adequately laid out in our first Decision ordering the remand, *James L. Bennett, et al. v. Sun Shipbulding & Dry Dock Company,* 5 BRBS 609, BRB Nos. 76-201, 76-202, and 76-203 (March 21, 1977) and thus need not be repeated. In that Decision, we affirmed the administrative law judge's finding that claimants' lung conditions were causally related to their employment with Sun Shipbuilding & Dry Dock Company (hereinafter referred to as employer); that claimants suffered disabilities; and that claimants gave proper notice according to Section 12 of the Act, 33 U. S. C. § 912.

However, we also determined that the administrative law judge improperly followed the mandate of Section 8(c)(21), 33 U. S. C. § 908(c)(21), with respect to his determination of the extent of each claimant's permanent partial disability. We noted that the administrative law judge "appeare[d] to have compared the claimants' wage-earning capacity before injury with their wage-earning capacity after the injury," which is clearly incorrect according to Section 8(c)21. Section 8(c)21 provides the compensation rate for a permanent partial disability is 66⅔ of the difference between the claimant's average weekly wage at the time of injury and wage-earning capacity thereafter.

Upon remand, the administrative law judge conducted a second hearing at which time employer submitted additional evidence with respect to claimants' wage-earning capacities. Thereafter, the administrative law judge issued his Decision on Remand in which he adopted his initial finding without modification that each

claimant suffered a twenty percent permanent partial disability. The administrative law judge explained that his use of the term "capacity" in his initial Decisions only "related that word to capacity to compete for work in the ship construction industry" and not to the term capacity as it is used in "wage-earning capacity" in Section 8(c)(21). He further stated that the above "represented but one factor that I used in effecting the determination, in each claim, the claimant suffered a twenty percent disability." He added that, in view of his undertaking-to-clarify, "I am confident the Board will no longer mandate that my measurement of [the] disability be based on claimant[s'] average weekly wage[s]."

Employer appeals the Decision on Remand and contends the administrative law judge's determination that each claimant suffered a twenty percent permanent partial disability is not supported by substantial evidence and that the method used therefore is not in accordance with law.[1]

Employer has also requested that the Board hold oral argument on the issue raised in this appeal. Their request is denied. 20 C. F. R. § 802.306.

While the record in this case does not lack evidence in general support of the administrative law judge's finding of the degree of disability, the administrative law judge again failed to properly follow the mandate of Section 8(c)(21). We again note that Section 8(c)(21) provides that

1. Employer also appears to seek a review of the administrative law judge's Decision with respect to attorneys' fees and costs. However, employer has failed to argue or brief for the Board the applicable facts or law. *See* 20 C. F. R. 802.210(b). Since mere assignment of error is not enough to invoke Board Review, we need not address these points. *See Shelton v. Washington Post Company*, 7 BRBS 54, BRB No. 73-358 (Dec. 15, 1977).

> . . . the compensation shall be 66⅔ per centum of the difference between [claimant's] average weekly wages and his wage-earning capacity thereafter. . . .

As we stated in *Lawson v. Atlantic & Gulf Grain Stevedores Co.*, 6 BRBS 770, 776, BRB No. 76-467 (Nov. 30, 1977),

> . . . where the administrative law judge makes a rough approximation of the amount of disability without reliance on the specific statutory scheme provided, we must remand for a redetermination of compensation benefits in line with the statutory wording. *See Belton v. Traynor*, 381 F. 2d 82, 85 (4th Cir. 1967).

Accordingly the Decision on Remand must again be remanded for redetermination of compensation benefits to each claimant in accordance with Sections 8(c)(21) and 8(h) of the Act. Specifically, the administrative law judge is directed to determine the wage-earning capacity in a dollar figure for each claimant at the time of the initial hearing. Since the administrative law judge, in his initial Decision, found the average weekly wages of claimants Bennett, Murphy, and Brooks to be $153.74, $158.79, and $151.01[2] respectively, the administrative law judge need only compute two-thirds of the difference between their average weekly wages and their wage-earning capacity.

In his Decision on Remand, the administrative law judge stated that he did not believe the Board would require his measurement of permanent partial disability to be based on claimants' average weekly wages. However,

2. It is unclear whether the administrative law judge in his initial Decision and Order found the average weekly wage of claimant Brooks to be $151.01 or $139.02. Therefore, upon remand, the administrative law judge must resolve this ambiguity.

we are not at liberty to disregard Section 8(c)(21) which clearly requires the procedure noted above. Although we may agree that the task is far from simple, the statutory scheme provided allows no less.

Therefore, the Decision on Remand is again remanded for further proceedings consistent with this opinion.

/s/ JULIUS MILLER
Julius Miller, Member

I concur: /s/ SAMUEL J. SMITH
Samuel J. Smith, Chairman

Dated this 28th day of
April, 1978

SERVICE SHEET

BRB No. 77-551: ROBERT N. MURPHY v. SUN SHIPBUILDING & DRY DOCK CO. (Case No. 76-LHCA-29) (OWCP No. 3-6412)

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CASE Nos. 76-LHCA-27
76-LHCA-29
76-LHCA-28

OWCP Nos. 3-6374
3-6412
3-6377

In the Matter of:

JAMES L. BENNETT
ROBERT N. MURPHY
LEROY BROOKS

Claimants

v.

SUN SHIPBUILDING & DRY DOCK CO.
Self-Insured Employer

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Before: JOYCE CAPPS
Administrative Law Judge

SECOND DECISION AND ORDER ON REMAND

Procedural Statement

Involved herein is a remand from the Benefits Review Board of Decision on Remand of July 13, 1977, by an administrative law judge who is no longer with the United States Department of Labor, and who shall hereinafter be referred to as the trial judge.

In its first Decision of these cases on March 21, 1977,[1] the Benefits Review Board determined that the trial judge in his initial Decision and Order dated February 19, 1976, improperly followed the mandate of Sec. 8(c)(21) with respect to his determination of the extent of each claimant's permanent partial disability. The Board remanded the cases for clarification and modification of findings as to the issue of extent of permanent partial disability. The Board noted that the trial judge appeared to have compared the claimants' wage-earning capacity before injury with their wage-earning capacity after the injury whereas Sec. 8(c)(21) provides that the compensation rate for a permanent partial disability is 66⅔ of the difference between the claimant's average weekly wage at the time of injury and wage-earning capacity thereafter.

Upon remand the trial judge conducted a second hearing and received additional evidence as to claimants' wage-earning capacities. In his Decision on Remand dated July 13, 1977, he clarified his reasoning with respect to diminished wage-earning capacity for each claimant and adopted his initial finding without modification that each claimant suffered a 20% permanent partial disability. However, he again failed to compute the benefits in accordance with Sec. 8(c)(21). The employer appealed said Decision on Remand contending that the finding that each

1. *Bennett et al. v. Sun Shipbuilding & Dry Dock Co.*, 5 BRBS 609, BRB Nos. 76-201, 76-202, and 76-203 (March 21, 1977).

claimant suffered a 20% permanent partial disability is not supported by substantial evidence and that the method used in arriving at such finding is not in accordance with law.

In its Decision dated April 28, 1978,[2] the Board determined that although there was sufficient evidence to support the finding of degree of disability, the cases must again be remanded for the purpose of determining the wage-earning capacity *in a dollar figure* for each claimant at the time of the initial hearing—i.e., all the undersigned must do now is to compute two-thirds of the difference between each claimant's average weekly wage and his wage-earning capacity in accordance with Secs. 8(c)(21) and 8(h) of the Act.

Findings of Fact

Each of these three claimants has a permanent lung condition which is causally related to his employment with Sun Shipbuilding and Dry Dock Company that has resulted in a loss of wage-earning capacity equivalent to 20%.

The average weekly wages of these claimants on or about October 9, 1972 (the date each was advised that x-rays revealed spots on the lungs) was established by stipulation of the parties to be $153.74 for Bennett, $158.79 for Murphy, and $151.01 for Brooks. However, for reasons not abundantly clear, the trial judge in his initial decision found that Brooks' average weekly wage on October 9, 1972, was $139.02 instead of the stipulated amount of $151.01. He apparently based his finding as to average weekly wage on earnings during 1972 plus certain hourly and wage figures that were submitted post-hearing for the period from 1970 through 1975. Since the question of

2. *Bennett et al. v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 212, BRB Nos. 77-511, 77-512, and 77-513 (April 28, 1978).

average weekly wage was not in issue by virtue of the stipulation, it appears reasonable to assume that the evidence as to certain hourly and wage figures was submitted on the loss of wage-earning capacity issue and was not furnished as a basis for determining average weekly wage. Therefore, it is specifically found that Brooks' average weekly wage on October 9, 1972, was $15.01 as stipulated.

Conclusions of Law

1. Claimant James L. Bennett is entitled to 20% permanent partial disability from October 10, 1972, to date and continuing until otherwise ordered, at the rate of $20.50 per week pursuant to Sec. 8(c)(21) of the Act, i.e., two-thirds of the difference ($30.74) between his average weekly wage at time of injury ($153.74) and his wage-earning capacity thereafter ($123.00).

2. Claimant Robert N. Murphy is entitled to 20% permanent partial disability from October 10, 1972, to date and continuing until otherwise ordered, at the rate of $21.17 per week pursuant to Sec. 8(c)(21) of the Act, i.e., two-thirds of the difference ($31.75) between his average weekly wage at time of injury ($158.79) and his wage-earning capacity thereafter ($127.04).

3. Claimant Leroy Brooks is entitled to 20% permanent partial disability from October 10, 1972, to date and continuing until otherwise ordered, at the rate of $20.14 per week pursuant to Sec. 8(c)(21) of the Act, ie., two-thirds of the difference ($30.20) between his average weekly wage at time of injury ($151.01) and his wage-earning capacity thereafter ($120.81).

Order

1. The Employer shall pay claimant James L. Bennett compensation for 20% permanent partial disability at the rate of $20.50 per week from October 10, 1972, to date of

this Order, which amount is now due and owing, and from the date of this Order shall continue to pay such compensation at the same rate in bi-weekly installments until otherwise ordered.

2. The Employer shall pay claimant Robert N. Murphy compensation for 20% permanent partial disability at the rate of $21.17 per week from October 10, 1972, to date of this Order, which amount is now due and owing, and from the date of this Order shall continue to pay such compensation at the same rate in bi-weekly installments until otherwise ordered.

3. The Employer shall pay claimant Leroy Brooks compensation for 20% permanent partial disability at the rate of $20.14 per week from October 10, 1972, to date of this Order, which amount is now due and owing, and from the date of this Order shall continue to pay such compensation at the same rate in bi-weekly installments until otherwise ordered.

4. In all other respects the initial Orders pertaining to these claimants remains unchanged.

/s/ Joyce Capps
Joyce Capps
Administrative Law Judge

Dated: December 19, 1978
Washington, D. C.

U. S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD

No. 79-139
79-172
79-173

JAMES L. BENNETT
Claimant-Respondent

v.

SUN SHIPBUILDING & DRY DOCK COMPANY
Self-Insured Employer-Petitioner

ROBERT N. MURPHY
Claimant-Respondent

v.

SUN SHIPBUILDING & DRY DOCK COMPANY
Self-Insured Employer-Petitioner

LEROY BROOKS
Claimant-Respondent

SUN SHIPBUILDING & DRY DOCK COMPANY
Self-Insured Employer-Petitioner

DECISION AND ORDER

Appeals from the Decision and Order on Remand of Joyce Capps, Administrative Law Judge, United States Department of Labor.

Ala Hamilton-Day (Galfand, Berger, Senesky, Lurie & March), Philadelphia, Pennsylvania, for the claimants.

John J. Runzer & Joseph F. Moore, Jr. (Pepper, Hamilton & Scheetz), Philadelphia, Pennsylvania, for the self-insured employer.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

PER CURIAM:

This is an appeal by the employer from the Decision and Order on Remand of Administrative Law Judge Joyce Capps pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. § 901 *et seq.* (hereinafter, the Act). These three cases (76-LHCA-27, 76-LHCA-28 & 76-LHCA-29) were consolidated on the initial appeal to the Board and have remained so during all subsequent proceedings.

The facts of each case were adequately set forth in our first decision herein, *Bennett, et al. v Sun Shipbuilding & Dry Dock Co.*, 5 BRBS 609, BRB Nos. 76-201, 76-202 & 76-203 (1977), and thus need not be repeated. In that decision, the Board affirmed Administrative Law Judge Pelkey's finding that claimants gave proper notice under Section 12 of the Act, 33 U. S. C. § 912; that claimants' lung conditions were causally related to their employment; and that claimants suffered disabilities. However, the Board held that the administrative law judge erred in his computation of permanent partial disability and remanded the case for a determination in accordance with the provisions of Sections 8(c)(21) and 8(h) of the Act. 33 U. S. C. §§ 908(c)(21), 908(h).

On remand, Judge Pelkey clarified the factors set forth in Section 8(h) which he considered in determining

claimants' lost earning capacity and reaffirmed his prior finding that claimants suffered a 20 percent loss of wage-earning capacity. On appeal, the Board concluded that although the evidence in general was sufficient to support the administrative law judge's finding of the degree of disability, the administrative law judge erred in failing to determine the wage-earning capacity in a dollar figure for each claimant and remanded the case for such a finding. *Bennett, et al. v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 212, BRB Nos. 77-511, 77-512 & 77-513 (1978).

On remand, Judge Capps was assigned to the case as Judge Pelkey had left the Department of Labor. In accordance with the remand instructions, Judge Capps determined the difference between claimants' average weekly wages and wage-earning capacities and based the awards for permanent partial disability on those figures. On appeal, employer contends that the administrative law judge's determination of wage-earning capacities is not in accordance with the statute.[1]

The Board's scope of review is limited. If the findings and conclusions of the administrative law judge are supported by substantial evidence, are not irrational, and are consistent with the applicable law, the order must stand. 33 U. S. C. § 921(b)(3); *O'Keeffe v. Smith Associates*, 380 U. S. 359 (1965).

In accordance with the Board's remand instructions, Judge Capps determined the difference between claim-

1. Employer also argues that both administrative law judges erred in failing to accept the current wages earned by claimants as establishing wage-earning capacity. However, this argument was addressed in the Board's first decision wherein it was held that Judge Pelkey's determination that claimants' actual earnings did not reasonably represent their wage-earning capacities was supported by substantial evidence. *Bennett, et al. v. Sun Shipbuilding & Dry Dock Co.*, 5 BRBS 609, BRB Nos. 76-201, 76-202 & 76-203 (1977).

ants' average weekly wages and their wage-earning capacities and based the awards for permanent partial disability on those figures. While Judge Capps expressed claimants' lost wage-earning capacities as the same percentage figure determined by Judge Pelkey, the Board has already determined that there is substantial evidence to support Judge Pelkey's finding as to the degree of disability. This was based upon consideration of the appropriate factors set forth in Section 8(h).

Accordingly, since the awards of permanent disability are supported by substantial evidence and were made in accordance with the statutory scheme, the administrative law judge's Decision and Order on Remand is affirmed.

So Ordered.

/s/ Samuel J. Smith
Samuel J. Smith, *Chief*
Administrative Appeals Judge

/s/ Julius Miller
Julius Miller
Administrative Appeals Judge

/s/ Ismene M. Kalaris
Ismene M. Kalaris
Administrative Appeals Judge

Dated this 29th day
of July 1980.

Opposition

Office - Supreme Court, U.S.
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ALEXANDER
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81-366

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

SUN SHIP, INC.,

Petitioner

v.

ROBERT N. MURPHY
and
DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO GRANT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether a claimant has suffered a permanent partial disability compensable under the Longshoremen's and Harbor Workers' Compensation Act when his actual post-injury earnings exceed his average weekly wage prior to the injury but the claimant's wage-earning capacity has been impaired since he contracted pneumoconiosis and therefore could never return to perform the duties of a sand blaster, a higher paying occupation than his normal post-injury occupation.

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No.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO GRANT OF PETITION FOR WRIT OF CERTIORARI

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals Judgment affirming an Award of Benefits to Murphy Is In Accordance with the Law of All Circuits and the Benefit Review Board.

The Petitioner (Sun Ship) has endeavored to create a case for jurisdiction on the Writ of Certiorari under Rule 17 of the Rules of the Supreme Court by alleging a conflict between the instant decision by the Third Cir-

cuit and the cases of *Welch v. Leavey*, 397 F. 2d 189 (5th Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969) and *Owens v. Traynor*, 396 F. 2d 783 (4th Cir.) *cert. denied*, 393 U.S. 962 (1968), aff'd 274 F. Supp. 770 (D. Md. 1966).

We hasten to point out that there is no such conflict and that the cases all stand for the same proposition. The law in the subject is that wages actually earned following an injury is at best only indicative of, and certainly not determinative of, "wage-earning capacity". An early and leading case on the point is *Twin Harbor Stevedoring Co., v. Marshall*, 103 F. 2d 513 (9th Cir. 1939). In that case the claimant was a foreman of stevedores who suffered an injury to his neck. He was out of work for approximately fourteen months and then resumed his work as a stevedore foreman. He demonstrated that he suffered from a series of disabilities including the inability to use a strong voice (he had to whisper) and a shortness of breath. But it is quite clear that he did not lose any wages as a result of these disabilities.

The Deputy Commissioner found that the claimant was suffering from a work related disability and had suffered the loss of "wage-earning capacity." The employer appealed the ruling and the Ninth Circuit affirmed. The following quotation sets forth clearly the law on the subject:

> Appellants urge that [claimant] was not entitled to an award in the light of the fact that he had been paid the old wage at all times since resuming work. The award it is said, violates the purposes of the Act in that the workman had suffered no economic loss entitling him to compensation. The controlling question, however, would seem to be whether the findings of the Commissioner are supported by evidence.

> The record abundantly sustains the findings. There is no doubt that the claimant's earning capacity and his ability to work have been seriously and permanently impaired. He has been kept on at his former wage, as the evidence shows, because of long service and the sympathetic attitude of his employer. It was substantially shown that he would be unable to do the work required in general stevedoring, and heavy or strenuous manual labor of any kind would seem to be beyond his powers. (905 F.2d at 515).

The petitioner takes the position that the decision of the Third Circuit in the instant case is contrary to the standards established by the Benefits Review Board itself. That this is obviously absurd is probably best shown by the leading case of *Kendrick v. Bethlehem Steel Corp.*, 3 BRBS 164 (1976) where the Board made the following comments which clearly supports the decision of the Third Circuit in the instant case:

> This is to determine whether a claimant's actual post-injury earnings do fairly and reasonably represent his wage-earnings capacity. Section 8h of the Act authorizes the Administrative Law Judge to 'fix such wage-earning capacity as shall be reasonable' and prescribes factors which he must consider in determining wage-earning capacity. 33 U.S.C. (§908h). He must gauge earning capacity on the claimant's ability to earn wages actually received. *Silverstein v. Service Printing Co., Inc.* 3 BRBS 143, BRB NO. 75 144 (Aug. 14, 1975). Furthermore, he must look to the future for factors that might have affected the claimant's capacity to earn wages in a physically disabled condition. He must consider the possibility that the claimant might lose his job. Thus, the availability of similar employment for a person in claimant's physical condition must be considered. *Sorsum Corda, Inc. v. Cooper* 1 BRBS 60, BRB No. 74 113 (Aug. 6, 1974); *Travelers Ins.*

> *Co. v. McClellan,* 288 F.2d (2d Cir. 1961); *United Foods Co. v. Cardillo,* 104 F. Supp. 81 (S.D. N.Y. 1952). When factors such as these are considered it has often been held that the claimant is permanently partially disabled even though his post-injury wages are greater than his previous average weekly wage. (at p. 166-167).

We now turn to the two cases already cited, but which the petitioner somehow feels are contrary to the decision in the instant case. The first case is the *Welch* case, *supra,* in which the significant point is that the Commissioner found that the claimants had **not** suffered a loss of wage earning capacity. In the instant case it must be reiterated that the finder of the fact, the Administrative Law Judge, found a loss of wage earning capacity. On the contrary in the *Welch* case, *supra* the Commissioner found no loss of wage earning capacity. When the Fifth Circuit affirmed it did so on the theory that the Commissioner had properly considered all the factors involved and found no loss of wage-earning capacity. The rule set forth by the Fifth Circuit was that any findings by the trier of the facts must be affirmed so long as there was "substantial evidence to support the holding . . ." (397 F.2d 191). This case was simply another one of hundreds in which the Court of Appeals upheld the findings of the fact-finder because there was evidence to support the holding. In *dictum* that Court even comments:

> The rule-of-thumb for the Commissioner is therefore that while [the] employee's wage-earning capacity is normally determined by his actual earnings, this is by no means necessarily so. (at p. 192).

The other cases relied heavily upon by the petitioner, *Owens v. Traynor, supra* is even further from the point. Again, in *Owens* like *Welch,* and unlike the instant case the Deputy Commissioner made a finding that the claimant had **not** demonstrated any loss of wage-earning

capacity. The claimant had suffered a herniated disc. However, he testified at the hearing that he had been earning increased wages. Furthermore, he testified that his duties as a test engineer involved "brain rather than brawn . . ." thus, he showed no evidence whatsoever that he suffered any loss of *wage-earning capacity* whatsoever. As a consequence this was a finding of the Deputy Commissioner sustained by the District Court and affirmed by the Fourth Circuit.

Next, the petitioner argues that the instant decision is inconsistent with the decision of the same court in *McCabe v. Sun Shipbuilding and Drydock Co.* 602 F.2d 59 (3d Cir. 1979). It is difficult to see how petitioner can reach a conclusion that *McCabe* is in any way contrary to the decision in the instant case. Briefly, in that case the Administrative Law Judge compared the hourly wages of a parking lot attendant (a job which the claimant could hold) with his hourly wage at the time of retirement. The Third Circuit ruled that this comparison was erroneous and that the appropriate comparison should have been between the wages the claimant would have been earning had he remained as a chipper (i.e., post-injury wage-earning capacity) and any wages he might have earned in some other position. Thus, again, we have a situation where the Court is determining loss of "wage-earning capacity" based upon what *might* be earned as opposed to *actual* earnings. Admittedly we have some difficulty in seeing how petitioner relies upon the *McCabe* case as supporting its position and then takes the position that "*McCabe* reflects its own deviation from the statutory formula." (Petitioner's Petition for Writ of Cert. p. 11).

Thus, we respectfully suggest to the Court that the various decisions of the different Circuits on the instant problem are all in harmony and there is no conflict as a consideration for this Court to grant the Petition for Certiorari.

Essentially what the petitioner is asking is for the Court to change the law on the subject of the review of decisions of the fact finder under the Longshoremen's and Harbor Workers' Act. This Court has set forth a specific rule in the subject when it stated that "the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law". *Cardillo v. Liberty Mutual Insurance* Co., 330 U.S. 469, 478 (1947). In that case the opinion further pointed out that in administering the Act the Deputy Commissioner must of necessity draw inferences. The Court points out that the scope of judicial review of these inferences is "sharply limited", and on the point this Court stated:

> If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference *** is conclusive. No reviewing Court could then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the Court because of a belief that the one chosen by the Deputy Commissioner is factually questionable. 330 U.S. 477, 478.

We have stated that the findings of the Administrative Law Judge must be affirmed where they are supported by "substantial evidence". This Court many decades ago defined the term "substantial evidence" as follows:

> It is evidence that affords "a substantial basis of fact from which the fact in issue can be reasonably inferred.*** [I]t must be enough to justify if the trial were to a jury in refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 299-300 (1939).

Although the law, primarily with respect to procedure has changed in the intervening decades and we are now under the Administrative Procedure Act, that has not changed the scope of judicial review as witness the statement of the Fifth Circuit In *Watson v. Gulf Stevedoring Corp.*, 400 F. 2d 6491 (5th Cir. (1960):

> The scope of judical review of administrative decisions under the Longshoremen's & Harbor Workers' Act has not changed as a result of adoption of Administrative Procedure Act. *O'Keefe v. Smith*, 380 U.S. 359. Inferences drawn by the Deputy Commissioner are to be accepted "unless they are irrational or unsupported by substantial evidence on the record *** as a whole." Id. 380 U.S. at 362 . . . .

Thus, we respectfully suggest on this point that the petitioner is asking this Court to change the rules relating to the review of findings made by the Administrative Law Judges so that the reviewing courts can reach conclusions independent of those reached by the trier of the facts. We believe that the day has long gone since that type of judicial review would be regarded as permissible or defensible.

II. The Rule that Permanent Partial Disability May Exist under the Longshoremen's Act Even Though Post-Injury Earnings Increase is well Settled, Universally Accepted and Requires No Further Precedent.

Petitioner takes the position that whether Compensation should be payable for disability under the Longshoremen's Act where the post-injury earnings are greater than the pre-injury earnings is a question which should be settled by this Court. We respectfully submit that this is an issue too well settled to merit the attention of the United States Supreme Court. Professor Arthur Larson in Vol. 2, *The Law of Workmen's Compensation* (1981) p. 1079 makes the following statement:

> It is uniformly held . . . without regard to statutory variations and the phrasing of the text, that a finding of disability may stand even where there is evidence of some actual post-injury earnings equalling or exceeding those received before the accident.

In footnote 44 Professor Larson cites cases, not only those based upon the Longshoremen's and Workers' Compensation Act, but also from the Worker's Compensation Act of almost every State in the United States.

In view of the unanimity of judicial decisions on this point it hardly seems necessary for this Court to accept jurisdiction simply to add it's voice to a well established proposition.

III. Even the Most Cursory Review of the Facts will Demonstrate that there is Substantial Evidence on the Record to Support the Findings of the Administrative Law Judge.

Although the petitioner has made an effort to couch the facts set forth in the Petition for the Writ of Certiorari in the most innocuous language possible, nevertheless, the damaging evidence is unavoidable. As the petition states: "On October 9, 1972, a routine x-ray in Sun Ship's dispensary revealed changes in Murphy's lungs which made advisable his permanent removal from blasting duties." (Petition p. 5) These changes were later "diagnosed as "pneumoconiosis." (*Ibid*). It is important that at that time Murphy had "additional opportunity to operate grid-blasting equipment for which a premium rate of $4.19 per hour was paid." (*Ibid.*) In brief, Murphy was accustomed to doing "grid-blasting" for the Company but when he discovered that he had pneumoconiosis, he could no longer perform that work.

The Third Circuit has defined this disease in *McCabe v. Sun Shipbuilding and Dry Dock, Co., supra* as follows:

> Pneumoconiosis is a chronic disease of the lungs marked by an overgrowth of connective tissue and caused by the inhalation of large quantities of dust. Symptoms include cough, pain in the chest, shortness of breath and fatigue after slight exertion. (Footnote 1)

Reducing these facts to their simplest terms we have a situation where an employee began working for Sun Ship in 1952 and toward the end of that same year began sand-blasting. (Appendix filed with Third Circuit page 331a and 332a, hereinafter cited without reference to the Appendix). The employee testified that he sand blasted an average of 5 and sometimes 6 days per week with a minimum of 3 days each week which continued for 20 years. One day in 1972, he was given a routine x-ray and then told by his foreman to see the head of the dispensary. There he was told, "Well, Mr. Murphy, you can't sand blast anymore." He was advised that he had problems with his lungs which had been caused by sand-blasting (334a).

These problems turned out to be pneumoconiosis. (353 a)

From the Decision and Order of Adminsitrative Law Judge David W. Pelkey (Page A4 of the Petition for the Writ) we learn that a vocational rehabilitation specialist/manpower consultant/psychologist testified that at the time of the hearing the Claimant was working as a grinding machine operator and as such he earned less than a sand blaster. This witness attributed "a 28%-30% vocational disability to claimant's age and lung condition" (Petition A5). In his opinion, the Administrative Law Judge further found that the claimant's "ability to earn a living . . . has been limited by an incapacity to compete for work as a sand blaster and a necessity to work at jobs that pay less than jobs including sand blasting duties. Measured in terms of his earning capacity in October 1972, Claimant's injury has cost him the capac-

ity to compete for work then paying $4.19 an hour and limited him so that he is competitive only for work then paying a lesser amount than $4.19. As of October 9, 1972, Claimant's earning capacity was reduced by approximately 21% (from $4.19 to $3.25 an hour)." (A15).

The Administrative Law Judge carefully considered the argument of the employer that the claimant was not really disabled. This is the language of the Administrative Law Judge on that Point:

> The administrative law judge also considered Employer's argument that Claimant is not disabled. For reasons now hope to be apparent, the submission, that no record evidence supports a finding that Claimant's earning capacity has been diminished, is rejected."
>
> The submission that Claimant's vocational specialist should not be controlling in a determination of extent of disability, is not meritorious. It should now be obvious the extent of this disability was measured by comparing capacities immediately before and immediately after discovery of the lung condition. Such a method of measurement is considered to be consistent with the legislative history and statutory provisions, relating to earning capacity, referenced by Employer on brief. It is not consistent with the argument that there has been no loss of capacity because there has been a post-injury increase in amount of earnings. That argument is rejected because, on the basis of the factual situation herein, it is not determined that post-injury wages, standing alone, do not represent wage earning capacity. (A16, A17).

On Appeal of the Employer the Benefits Review Board remanded the case for clarification because the Claimant was not performing blasting work on a full time basis and that should be taken under consideration. However, the remand decision of the Benefits Review

Board in no way questioned the loss of wage-earning capacity. (A23 to A33).

On remand the Administrative Law Judge clarified his position and adopted the findings without modification (A43).

On appeal the Benefits Review Board again remanded solely because of problems related to the computation of the benefits which should be paid under the Act. (A44).

On the next remand the matter came before a new Administrative Law Judge, Joyce Capps, who again found that the Claimant had "a permanent lung condition which is causally related to his employment with Sun Ship Building and Dry Dock Company that has resulted in a loss of wage-earning capacity equivalent to 20%". She made new calculations and otherwise ruled that the initial order should remain "unchanged". (A54). This was then sustained by the Benefits Review Board (A55), and the U.S. Court of Appeals for the Third Circuit, (A1).

Summarizing the foregoing, we have a simple situation in which a Claimant under the Longshoremen's Act contracted pneumoconiosis which disqualified him from performing duites as a sandblaster which is a higher paying occupation. Because of increases in wages, inflation, and other economic conditions the claimant can earn more despite his pneumonconiosis that he did prior to the discovery of the disability. However, the record is clear that if the claimant had not contracted pneumoconiosis he could have continued as a full time or a part time sandblaster and earned more post-injury than he was earning pre-injury. The administrative authorities found a loss of wage-earning capacity, the record unquestionably sustains the finding and the Court of Appeals sustained the finding. We submit that there is no problem to be considered by the U.S. Supreme Court.

CONCLUSION

For the foregoing reasons, the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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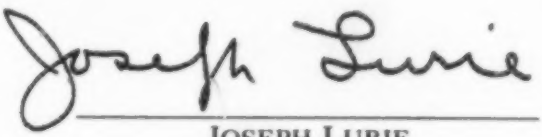
CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 1981, three copies of the Brief in Opposition to Grant of Petition for Writ of Certiorari were mailed by First Class Mail, Postage Prepaid, to Jeffery C. Hayes, Esquire, Pepper, Hamilton & Scheetz, 123 South Broad Street, Philadelphia, Pa. 19109. I further certify that all parties required to be served have been served.



JOSEPH LURIE

Opposition

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FILED
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ALEXANDER L. STEVAS
CLERK

No. 81-366

In the Supreme Court of the United States

OCTOBER TERM, 1980

SUN SHIP, INC., PETITIONER

v.

ROBERT N. MURPHY AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an award for permanent partial disability under the Longshoremen's and Harbor Workers' Compensation Act is proper when, despite increased post-injury wages, a loss of wage-earning capacity has been established.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-366

SUN SHIP, INC., PETITIONER

v.

ROBERT N. MURPHY AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Judgment Order of the court of appeals (Pet. App. A1-A2) is unreported. The final opinion of the Benefits Review Board (Pet. App. A55-A58) is reported at 12 B.R.B.S. 539. The second opinion of the Board (Pet. App. A44-A48) is reported at 8 B.R.B.S. 212. The original opinion of the Board (Pet. App. A23-A33) is reported at 5 B.R.B.S. 609. The decisions of the Administrative Law Judge (Pet. App. A3-A22, A34-A43, A50-A54) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1981. The petition for a writ of certiorari was filed on August 26, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Murphy was employed from 1952 until early 1975 in the cleaning department of petitioner Sun Ship's shipbuilding facility (Pet. App. A5). In addition to general cleaning duties, the more senior employees of the cleaning department spend at least 30% of their time doing "very dirty and difficult" jobs such as sandblasting, for which they receive premium pay (*id.* at A7). Murphy testified that he performed sandblasting duties about three times a week (*id.* at A5). In October 1972 a routine x-ray at petitioner's dispensary revealed that Murphy had developed a lung condition (*id.* at A5-A6). The dispensary director told Murphy that he had dust " 'or something' " in his lungs and that the condition was caused by sandblasting (*ibid.*). Murphy therefore was removed from sandblasting work, although he remained in the cleaning department until early 1975 at the wages of a cleaner (*id.* at A6). Murphy was then transferred to petitioner's boiler shop where he worked as a mechanic at $4.92 per hour, which was $.41 per hour more than his earnings as a general cleaner but less than the $5.31 per hour being paid for sandblasting work at that time (*id.* at A5-A6).

2. Respondent Murphy filed a claim in March 1974 for benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. III) 901 *et seq.*, and the case was referred to an Administrative Law Judge (ALJ). After a formal hearing, the ALJ found that Murphy's lung condition was causally related to his maritime employment and that he had sustained a 20% loss of wage-earning capacity within the meaning of Section 8(h) of the Act, 33 U.S.C. 908(h), because he could no longer perform sandblasting duties at premium wages (Pet. App. A15-A16, A18). The ALJ rejected the argument that Murphy had not sustained a loss of wage-earning capacity because his post-injury wages as a mechanic were higher than his pre-injury

average weekly wages. The ALJ noted that "post-injury wages, standing alone, do not represent wage-earning capacity" (*id.* at A17). The ALJ based his finding of reduced wage-earning capacity on several factors, including the testimony of a vocational rehabilitation specialist who testified that Murphy had a 28%-30% vocational disability and absent the lung condition "would have had an hourly earning capacity of $5.00" (*id.* at A5). The ALJ concluded that, given claimant's "age, education and work history" and "the fact that he has not undergone formal vocational retraining experiences, 20% constitutes a supportable measure of Claimant's loss of capacity to earn the wages he was earning in the ship construction industry at the time of his injury" (*id.* at A15-A16).

Petitioner appealed the ALJ's determination to the Benefits Review Board pursuant to 33 U.S.C. 921(b)(3).[1] The Board rejected petitioner's argument that Murphy was not entitled to compensation because he had lost no work time and had actually increased his post-injury earnings. The Board pointed out that Section 8(h) of the Act, 33 U.S.C. 908(h), "provides that if a claimant's actual post-injury earnings do not fairly and reasonably represent his wage-earning capacity, the administrative law judge may 'fix such wage-earning capacity as shall be reasonable' " (Pet. App. A28). The Board noted the testimony of the vocational rehabilitation specialist regarding Murphy's loss of earning capacity and stated that "[t]here can be no dispute" that Murphy was no longer able to work as a sandblaster and was "also precluded from working in an atmosphere where dusts or fumes are present" (*id.* at A29). In view

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[1]Respondent Murphy's claim was consolidated before the Board with those of two other Sun Ship employees, James L. Bennett and Leroy Brooks. During the rest of the proceedings below, the three claims remained consolidated. Petitioner here seeks review of the judgment of the court below only as it relates to the claim of respondent Murphy (Pet. 4 n.1).

of these facts, the Board concluded that the ALJ could find Murphy disabled, even though he lost no actual work time and received higher wages than before the injury (*ibid.*). The Board, however, reversed and remanded the case to the ALJ for "clarification and modification of his findings as to the extent of disability in accordance with Section 8(c)(21)," which provides that compensation shall be 66 2/3% of the difference between pre-injury average weekly wages and post-injury wage-earning capacity (*id.* at A30). The Board stated that the ALJ appeared to have improperly compared Murphy's post-injury wage-earning capacity with the wages he might have earned if he had remained a full-time sandblaster at the premium rate (*ibid.*).

On remand, the ALJ attempted to clarify his earlier order by stating that his prior "determination of extent of disability did not utilize pre-injury wage-earning capacity instead of average weekly wages" (Pet. App. A42). The ALJ therefore found no need to modify his disability determination, and he reaffirmed his prior finding of a 20% permanent partial disability (*id.* at A41-A43).

Petitioner again appealed to the Benefits Review Board. Although it noted that "the record in this case does not lack evidence in general support of the administrative law judge's finding of the [20%] degree of disability," the Board again remanded the case (Pet. App. A46). The Board held that the ALJ had still failed to comply with the requirements of Section 8(c)(21) of the Act, 33 U.S.C. 908(c)(21), and it directed the ALJ "to determine the wage-earning capacity in a dollar figure for * * * claimant at the time of the initial hearing" (*id.* at A47). Since the ALJ's original decision established Murphy's pre-injury average weekly wages as $158.79, the Board stated that to determine the compensation to which Murphy was entitled "the administrative law judge need only compute two-thirds of the difference between [his] average weekly wages and [his] wage-earning capacity" (*ibid.*).

By the time of the second remand, the initial ALJ had left the Department of Labor, and the case was reassigned. The new ALJ issued a decision and order specifying the precise dollar amount of Murphy's lost wage-earning capacity (Pet. App. A53-A54). Murphy was found "entitled to 20% permanent partial disability * * * at the rate of $21.17 per week pursuant to Sec. 8(c)(21) of the Act, i.e., two-thirds of the difference ($31.75) between his average weekly wage at time of injury ($158.79) and his wage-earning capacity thereafter ($127.04)" (*id.* at A53).

On a third and final appeal by petitioner, the Board issued a per curiam opinion upholding the ALJ's order. The Board held that the ALJ had correctly determined the difference between claimant's average weekly wages and his post-injury wage-earning capacity and had properly based the award for permanent partial disability on those figures (Pet. App. A57-A58). The Board recognized that the second ALJ found that Murphy suffered the same 20% loss of wage-earning capacity determined by the first ALJ, but it upheld this determination because "there is substantial evidence to support [the] finding as to the degree of disability" (*id.* at A58).

3. Petitioner filed a petition for review in the court of appeals under 33 U.S.C. 921(c), pursuing its contention that Murphy had sustained no impairment of his wage-earning capacity. The court of appeals summarily affirmed the decision of the Benefits Review Board (Pet. App. A1).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any ruling of this Court or another court of appeals, and reflects well-established law under the Longshoremen's and Harbor Workers' Compensation Act. Further review is therefore unwarranted.

1. Section 8(c)(21) of the Act, 33 U.S.C. 908(c)(21), is designed to compensate injured workers for wage-earning capacity lost as a result of an employment-related injury. The section provides that "compensation shall be 66 2/3 per centum of the difference between [the] average weekly wages and [the] wage-earning capacity thereafter in the same employment or otherwise." Under Section 8(h) of the Act, 33 U.S.C. 908(h), post-injury wage-earning capacity is measured by a claimant's actual post-injury earnings, if they constitute a reasonable representation of a claimant's earning capacity. When, however, actual earnings are not a fair representation of wage-earning capacity, Section 8(h) directs the ALJ to

> fix such wage-earning capacity as shall be reasonable, having due regard to the nature of [claimant's] injury, the degree of physical impairment, [claimant's] usual employment, and any other factors or circumstances in the case which may affect [claimant's] capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

The rulings below complied with this statutory directive. Respondent Murphy's work-related lung condition deprived him of the capacity of working in an atmosphere where dust or fumes are present (Pet. App. A29). The original decision of the ALJ correctly described the effect of this lung condition on Murphy's earning capacity: "His ability to earn a living [in the ship construction industry] has been limited by an incapacity to compete for work as a sandblaster and a necessity to work at jobs that pay less than jobs including sandblasting duties" (*id.* at A15). Based upon testimony from a vocational rehabilitation specialist regarding the degree of Murphy's vocational disability, and after considering Murphy's age, education, work history, and lack of formal vocational retraining, the ALJ reasonably concluded that Murphy had suffered a 20% reduction in wage-earning capacity.

2. The only legal issue presented by petitioner for review is whether a compensable permanent partial disability may be incurred regardless of the fact that a claimant's post-injury wages exceed his pre-injury wages. It is, however, well-settled under the Act that once a loss of wage-earning capacity is proven, as it was here, disability compensation is appropriate despite an injured worker's receipt of equal or higher post-injury wages. See, *e.g. Bath Iron Works Corp.* v. *White*, 584 F. 2d 569, 575 (1st Cir. 1978); *Portland Stevedoring Co.* v. *Johnson*, 442 F. 2d 411 (9th Cir. 1971); *Travelers Insurance Co.* v. *McLellan*, 288 F. 2d 250, 252 (2d Cir. 1961); *Burley Welding Works, Inc.* v. *Lawson*, 141 F. 2d 964, 966 (5th Cir. 1944); *Luckenbach Steamship Co.* v. *Norton*, 96 F. 2d 764, 765 (3d Cir. 1938); *Hartford Accident & Indemnity Co.* v. *Hoage*, 85 F. 2d 420, 422 (D.C. Cir. 1936).[2] Disability awards are not tied to out-of-pocket losses, but are designed to compensate an injured worker for lost future earning capacity. *Bath Iron Works Corp.* v. *White, supra*, 584 F. 2d at 575. See also *Lumber Mutual Casualty Insurance Co.* v. *O'Keeffe*, 217 F. 2d 720, 722 (2d Cir. 1954); *Twin Harbor Stevedoring & Tug Co.* v. *Marshall*, 103 F. 2d 513, 515 (9th Cir. 1939).

Petitioner incorrectly asserts (Pet. 9) that the decision below conflicts with two other court of appeals decisions.[3] In both cases cited by petitioner, however, it was recognized that if a loss of wage-earning capacity is established, a

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[2]This principle is a fundamental tenet of both federal and state workmen's compensation law. See 2 Larson, *The Law of Workmen's Compensation* § 57.21 (1981).

[3]Petitioner also asserts (Pet. 10-11) that the decision below conflicts with *McCabe* v. *Sun Shipbuilding & Dry Dock Co.*, 602 F. 2d 59 (3d Cir. 1979). Other than to argue with the *McCabe* court's interpretation of 33 U.S.C. 908(c)(21), however, petitioner fails to explain how this case conflicts with that opinion. In any event, even if an intra-circuit conflict exists, it would not warrant resolution by this Court.

claimant may be entitled to compensation even if he returns to work at the same or higher wages than before the injury. *Welch* v. *Leavey*, 397 F. 2d 189, 191-192 (5th Cir. 1968), cert. denied, 393 U.S. 1049 (1969); *Owens* v. *Traynor*, 274 F. Supp. 770, 773 (D. Md. 1966), aff'd, 396 F. 2d 783 (4th Cir.), cert. denied, 393 U.S. 962 (1968).[4] In *Welch* and *Owens*, the fact finders determined that the claimants suffered no loss of wage-earning capacity because, on the facts presented, their post-injury earnings *did* fairly reflect earning capacity; compensation was denied only on that basis. *Welch* v. *Leavey*, *supra*, 397 F. 2d at 192; *Owens* v. *Traynor*, *supra*, 274 F. Supp. at 774, 396 F. 2d at 784.

Thus, the legal issue petitioner presents for review is already settled and presents no conflict needing resolution by this Court. Petitioner's challenge to the particular finding of lost wage-earning capacity in this case is, of course, a purely factual question.[5] The Benefits Review Board has repeatedly reviewed the record in this case and has determined that there is substantial evidence to uphold the ALJ's

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[4]In fact, the ALJ relied on *Owens* v. *Traynor*, *supra*, in finding a loss of earning capacity in this case (Pet. App. A15).

[5]Petitioner complains (Pet. 8-9) that the ALJ "failed to consider whether Murphy's higher earnings and improved prospects as a third and subsequently a second class mechanic" affected his wage-earning capacity. As discussed above, the ALJ did consider Murphy's higher wages as a mechanic at the time of the initial hearing (Pet. App. A6, A17), but he correctly refused on remand to consider any new evidence relating to post-injury wage-earning capacity, such as Murphy's progression as a mechanic after the initial hearing (*id.* at A42-A43). If petitioner contends that Murphy's extended transfer to its boiler shop resulted in vocational retraining such that his inability to compete for premium blasting jobs and work in dusty environments is no longer relevant to his future job opportunities and earning capacity, petitioner should seek a modification of the award pursuant to 33 U.S.C. 922.

finding that respondent Murphy suffered a loss of wage-earning capacity, and the court of appeals summarily affirmed. This factual dispute does not merit review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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